DOCKET

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 86-133-ASX
Status: GRANTED

Docketed:
July 29, 1986

Title: James Patrick Nollan, et ux., Appellant
v.
California Coastal Commission

Court: Court of Appeal of California,
Second Appellate District

Counsel for appellant: Best, Robert K.

Counsel for appellee: Patterson, Jamee Jordan

Entry	Date	Note	Proceedings and Orders
1	Jul 29 1986	G	Statement as to jurisdiction filed.
3	Aug 4 1986		Order extending time to file response to jurisdictional statement until September 17, 1986.
4	Sep 15 1986		Motion of appellee CA Coastal Commn. to dismiss or affirm filed.
5	Sep 17 1986		DISTRIBUTED. October 10, 1986
6	Oct 1 1986	X	Reply brief of appellants James Nollan, et ux. filed.
8	Oct 14 1986		REDISTRIBUTED. October 17, 1986
9	Oct 20 1986		PROBABLE JURISDICTION NOTED.
			**********
10	Nov 24 1986		Record filed.
12	Nov 24 1986		Order extending time to file brief of appellant on the merits until December 19, 1986.
14	Nov 26 1986	D	Motion of appellee to dismiss appeal filed.
15	Dec 1986		Brief of appellants James Nollan, et ux. in response to motion of appellee to dismiss filed.
16	Dec 8 1986		DISTRIBUTED December 12, 1986 (Motion of appellee to dismiss appeal).
17	Dec 15 1986		Motion of appellee to dismiss appeal DENIED.
18	Dec 18 1986		Joint appendix filed.
19	Dec 18 1986		The joint appendix is in volumes I & II.
20	Dec 18 1986		Brief of appellants James Nollan, et ux. filed.
21	Dec 18 1986		Brief amicus curiae of Breezy Point Cooperative filed.
22	Dec 17 1986		Brief amicus curiae of Natl. Assn. of Home Builders, et al. filed.
23	Dec 19 1986		Brief amicus curiae of California Association of Realtors filed.
24	Dec 19 1986		Brief amicus curiae of Legal Foundation of America filed.
25	Dec 19 1986		Brief amicus curiae of United States filed.
27	Jan 12 1987		Order extending time to file brief of appellee on the merits until February 7, 1987.
28	Feb 3 1987		Brief amicus curiae of Natural Resources Defense Council, et al. filed.
29	Feb 7 1987		Brief amicus curiae of California Cities and Counties, et al. filed.
30	Feb 6 1987		Brief amicus curiae of Council of State Governments, et al. filed.
31	Feb 7 1987		Brief amicus curiae of Massachusetts, et al. filed.
32	Feb 6 1987		SET FOR ARGUMENT. Monday, March 30, 1987. (2nd case)
33	Feb 17 1987		Brief of appellee CA Coastal Commission filed.

No. 86-133-ASX

Entry	Date	Note	Proceedings and Orders
34	Feb 17 1987		CIRCULATED.
35	Feb 13 1987		Lodging received. (9 copies).
36	Feb 7 1987	X	Brief amicus curiae of Coastal States Organization, et al. filed.
37	Mar 20 1987	X	Reply brief of appellants James Nollan, et ux. filed.
38	Mar 30 1987		ARGUED.

JURISDICTIONAL

STATEMENT

86-133

No. .....

Supreme Court, U.S.
FILED
JUL 29 1986
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellees.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

JURISDICTIONAL STATEMENT

Of Counsel

TIMOTHY A. BITTLE
JOHN H. LEE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
ROBERT K. BEST
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 228-8845 (tone) 75
or call collect (402) 342-2831

90 pp

QUESTIONS PRESENTED

1. Having determined that a permit condition which exacts a dedication of access across real property to allow a physical invasion for public use is a valid exercise of the police power, must the state courts then evaluate whether compensation under the Fifth Amendment is nonetheless owing?

2. Where the state courts have found that reconstruction of a personal residence did not create the public's need for access across the owner's beach, is the owner bearing more than his share of a public burden when he is required to sustain 100% of the cost of providing public use of his beach without compensation?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the California Court of Appeal.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	iv
JURISDICTIONAL STATEMENT	1
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	3
STATEMENT OF THE CASE	3
THE QUESTIONS PRESENTED ARE SUBSTANTIAL	12
A. Introduction	12
B. Under California Law the State May Exact a Property Interest To Allow Physical Invasion of the Property Without Payment of Just Compensation and Without Demonstrating That the Benefits Received or Burdens Created by the Property Owner Are Directly Related to the Nature and Extent of the Property Interest Taken	15
C. Under the Just Compensation Clause, the Exaction of a Property Interest To Allow Physical Invasion of the Property for Public Use Is Invalid Without Payment of Compensation Unless the Burdens Created or Benefits Received by the Property Owner Are Directly Related to the Nature and Extent of the Property Interest Taken	20
D. Under Constitutional Standards the Exaction of Public Access from the Nollans Is Invalid Without Payment of Just Compensation	22
CONCLUSION	26

TABLE OF AUTHORITIES

Page

CASES

Agins v City of Tiburon, 447 U.S. 255 (1980) 13, 17, 23

Andrus v. Allard, 444 U.S. 51 (1979) 21

Armstrong v. United States, 364 U.S. 40 (1960) 14, 23

Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633 (1971) 15, 16, 17

Ayres v. City Council of the City of Los Angeles, 34 Cal. 2d 31 (1949) 15

Berman v. Parker, 348 U.S. 26 (1954) 21

Eiger v. Garrity, 246 U.S. 97 (1918) 21

Georgia-Pacific Corp. v. California Coastal Commission, 132 Cal. App. 3d 678 (1982) 17, 18, 19

Grupe v. California Coastal Commission, 166 Cal. App. 3d 148 (1985) 18, 19

Hawaii Housing Authority v. Midkiff, — U.S. —, 81 L. Ed. 2d 186 (1984) 21

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 24

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 4, 13, 14, 20, 22, 24

Mid-Way Cabinet Fixture Manufacturing v. County of San Joaquin, 257 Cal. App. 2d 181 (1967) 15

National Cable Television Association v. United States, 415 U.S. 336 (1974) 25

Norsco Enterprises v. City of Fremont, 54 Cal. App. 3d 488 (1976) 16

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 14, 23, 24

TABLE OF AUTHORITIES—Continued

Page

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 21, 22, 23

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 23

Remmenga v. California Coastal Commission, 163 Cal. App. 3d 623 (1985) 18, 19

Ruckelshaus v. Monsanto Co., — U.S. —, 81 L. Ed. 2d 815 (1984) 24

Scrutton v. County of Sacramento, 275 Cal. App. 2d 412 (1969) 15, 16

Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941 (1982) 21

United States v. Causby, 328 U.S. 256 (1945) 14

United States v. Security Industrial Bank, 459 U.S. 70 (1982) 4, 14, 20, 21, 22

STATUTES

28 U.S.C. § 1257(2) 3

Public Resources Code § 30212 ..... 2, 3, 4, 12, 22

UNITED STATES CONSTITUTION

Fifth Amendment 2, 3, 7, 26

Fourteenth Amendment 2, 3, 26

MISCELLANEOUS

Coastal Access Program Fifth Annual Report, A Joint Report of the California Coastal Commission and the State Coastal Conservancy (January, 1985) 12, 13

No. .....

—o—

In The
Supreme Court of the United States
October Term, 1986

—o—

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellees.

—o—

On Appeal from the Court of Appeal of the State of California, Second Appellate District

—o—

JURISDICTIONAL STATEMENT

—o—

James Patrick Nollan and Marilyn Harvey Nollan, the appellants, appeal from the final judgment of the Court of Appeal of the State of California, Second Appellate District, sustaining the validity of California Public

Resources Code § 30212 as applied to the Nollans over the Nollans' objection that applying the statute to their circumstances without compensation violates the Fifth and Fourteenth Amendments to the United States Constitution.

—o—

OPINIONS BELOW

The opinion of the California Court of Appeal is reported at 177 Cal. App. 3d 719 (1986) and attached as Appendix A. The order of the California Supreme Court denying review is unpublished and attached as Appendix B. The notice of appeal is attached as Appendix C. The trial court's statement of decision is unpublished and attached as Appendix D. The staff report adopted as the decision of the California Coastal Commission is unpublished and attached as Appendix E.

—o—

JURISDICTION

The Court of Appeal filed its opinion on January 24, 1986, reversing a favorable judgment for the Nollans in the Superior Court. A petition for rehearing was denied February 18, 1986. The Nollans petitioned for review before the Supreme Court of California. That petition was denied by order dated April 30, 1986, at which point the proceeding became final in the California state courts. A notice of appeal to this Court was filed with the California Court of Appeal on May 14, 1986. The appeal is

timely. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(2).

—o—

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the United States Constitution provides:

> "[N]or shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Public Resources Code § 30212 is attached as Appendix F.

—o—

STATEMENT OF THE CASE

As a condition of a permit to rebuild their house, the Nollans were required by the California Coastal Commission to dedicate access across the beach area of their property for public use, nearly one-third of their property. The commission in imposing the condition, and the Court of Appeal in sustaining the condition, relied upon

California Public Resources Code § 30212. Appendix A at 7-8; Appendix E at 11. Section 30212, in pertinent part, requires that whenever construction, repair, or improvement activity occurs on private property between the last public road and the ocean, a dedication of access along the beach must be provided by the owner. *See* Appendix F.

The Nollans objected to the exaction before the commission in writing on the grounds that their project did not affect existing public access along the coast nor create a need for more public access, and in the absence of such facts it would violate the just compensation provision of the Fifth Amendment to require them to bear fully the cost of providing the public the benefit of more public beach. The Nollans also pled the just compensation issue in their writ of mandate filed in the trial court and argued it in their brief before the appellate court. Over the Nollans' objection, Section 30212 and its application to them were upheld by the California Court of Appeal which applied a California rule of law that "the justification for required dedication [of a property interest to the state] is not limited to the needs of or burdens created by the project." 177 Cal. App. 3d at 723, Appendix A at 7. Thus, no "taking" analysis occurred, only an analysis of whether the exaction was authorized by Section 30212. This approach conflicts with clear precedents of this Court, including: *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), and *United States v. Security Industrial Bank*, 459 U.S. 70 (1982).

The Nollans are the owners of a 3,800 square foot residential beach lot in Ventura County, California. The

property is part of what is known as the Faria Tract. Faria County Park, an oceanside public park with a public beach and recreation area, is within one-quarter of a mile upcoast of the Nollan property and was donated to the public by the Faria family, the Nollans' predecessors in interest. Another public beach area, known locally as "the Cove," lies within 1,800 feet downcoast from the Nollans.

At first the Nollans leased their property from the Faria family with an option to buy. The building that was on the Nollans' lot at the beginning of the lease was a small bungalow, totaling only 504 square feet. The Nollans used this original structure as a rental for summer vacationers. After years of rental use, however, the building had fallen into disrepair. The abuse of summer renters, winter vandals, and the natural elements had taken their toll. Its deteriorated condition, small size, and shabby appearance made it an eyesore and a nuisance in an otherwise attractive neighborhood of newer, larger homes. The structure fell below many building, health, and safety code standards and the Nollans were eventually forced to stop renting it.

The Nollans' option to purchase the property had been conditioned on the Nollans' promise to demolish the substandard residence and replace it.[1] On February 25, 1982, the Nollans submitted a permit application to the California Coastal Commission. The application requested a permit to demolish the existing substandard

---

[1] After winning this case in the trial court, the Nollans satisfied these conditions, exercised their option to purchase the property, and constructed the new residence.

dwelling and replace it with a three-bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed by mail that their application had been placed on the administrative calendar for the April 7, 1982, commission hearing in Eureka, California. They were further informed that the commission staff was recommending as a condition to the permit that the Nollans be required to dedicate to the state a public use easement over approximately one-third of their lot. The Nollans were unable to attend the April 7, 1982, hearing because of the burdens involved in traveling to Eureka from their residence in Los Angeles, a distance of some 630 miles. The Nollans were told that they could give their testimony to a member of the commission's staff in Santa Barbara, who would receive comments regarding various applications from persons who were unable to attend the hearing in Eureka, and would then relay the comments to the commission at the hearing.

Mr. Nollan went to Santa Barbara and presented written and oral objections to the imposition of the easement condition recommended by staff. At the April 7, 1982, hearing in Eureka the commission had before it Mr. Nollan's comments plus the Nollans' permit application, maps, photographs, plans, and additional project information solicited by the commission. Together, these materials detailed the location, appearance, dimensions, number of rooms, and intended use of both the existing house and the proposed house. As staff had recommended, the commission approved the permit on condition that the Nollans dedicate an easement for use of their beach to the public. The commission decision stated:

> "Prior to the issuance of the Coastal Development Permit, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution."

On June 3, 1982, the Nollans filed a petition for writ of administrative mandate to have the access condition invalidated. The Nollans argued, *inter alia,* that the commission's authority to exact real property as a condition of land use approval is limited to situations where it appears from the facts that there is a direct causal relationship between the exaction and a public need created by the proposed development which the exaction will meet. In the absence of such a relationship, they argued, the exaction of real property without compensation violates the Fifth Amendment. Finally, the Nollans argued that their plans to demolish an existing single-family dwelling and construct another single-family dwelling in its place did not create a public need for more public beach; that any need the state had for more public beach was a preexisting need, not a need caused by the Nollans.

The Superior Court agreed with the Nollans and entered judgment in their favor. The court entered findings as follows:

> "Petitioners are not building a single-family residence on a vacant lot but rather are replacing a single-family residence with another single-family residence. Petitioners are not changing the use of the property.

> It does not appear that the replacement home is out of character with the other houses in the area. Although the house that will be built by petitioners is nearly three times as large as the small house now on the property, the record does not show at this time that its placement on existing residential private property will burden the public's otherwise available access to the beach." Clerk's Transcript on Appeal (CT) at 235.

The court entered conclusions of law as follows:

> "The Commission may constitutionally require a grant of public access only when the facts in the case before it demonstrate that a proposed development will place a burden on public access to the coast. . . .
>
> "In ruling on coastal development permits, the Commission must make a case-by-case analysis of the evidence presented to determine whether a burden has been placed on public access to the coast. A valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access." CT at 235.

The judgment set aside the commission's decision and remanded the case to the commission to "make proper evidentiary findings, and take action [on the Nollans' permit application] in accordance with this decision." CT at 236. The decision was not appealed. Instead, in return to the writ, the commission stated: "In closed session, the Commission voted to accept the directive of the peremptory writ and to order petitioners' permit application set for a full evidentiary hearing." CT at 243. Thus, the first action of this case became final.

On remand, the commission's staff reported to the commission that the court had merely ruled that "the

record does not show at this time" a public burden resulting from the Nollans' project. The staff assured the commission that a record could be compiled that would show a public burden, and recommended that the commission affirm its original decision. At the April 28, 1983, hearing on remand, the commission opened the record and received from its staff a mass of information, all from sources unrelated to the Nollan application. The information consisted of such things as literature on public access needs in general, planning guides describing where additional access would be desirable, studies on the effects of development at Lake Tahoe, articles on access problems in other states, excerpts from surfing publications describing Faria Beach as a good place to surf, a draft land use plan for the City of Santa Monica, and commission decisions on other people's permit applications. No new evidence was presented about the Nollan project.[2]

Next the record was opened for public testimony. Two members of the public were called to speak. Both spoke not in opposition to the Nollan project, but in support of gaining more public beach. Neither identified any public needs that would be created by the Nollan project.

No other members of the public were called to speak although the commission had "all kinds of slips with this number on it." The commission might have heard testimony reflecting neighborhood support for the Nollans'

---

[2] The trial court later wrote: "A review of the administrative record indicates that the commission's own staff were petitioners' principal adversaries on remand, improperly assuming the role of advocates." Appendix D at 4.

proposal to tear down their substandard dwelling, except that the commission chairman ruled:

> "I assume at least on behalf of the applicant, Ms. Lambert, you were speaking on behalf of your client and anybody else in support of the position. . . .
>
> . . . .
>
> "Our procedures typically are that when we're having a hearing only we hear from the applicant and then any opposition. . . ." Administrative Record at 544-45.

The public hearing was concluded. The commission voted to retain the condition requiring dedication of an easement from the Nollans.

On June 23, 1983, after the final vote on the Nollans' permit application, the commission held a meeting to adopt findings which would support its decision. It is clear from the transcript of that meeting that the commission was requiring a dedication from the Nollans based upon the location of their property, and upon the commission's agenda for acquisition of public beach, regardless of what impact the Nollans' project would have on the public. One commissioner stated:

> "One thing that Nollan does, if it does come through the court a second time and the court makes the same finding, is it will allow a potential offer to dedicate in the middle of a series of offers to dedicate to suddenly disappear.
>
> "So even though we can look down the coast and up the coast except for Mr. Nollan, we have access . . . we're planning on combining all these together to make this fluid access . . . taking a chunk of an access *that we had counted on* out really causes an inability for continuity . . . ." CT at 486-87 (emphasis added).

On July 15, 1983, the Nollans returned to court with another mandamus petition. Again the Superior Court ruled in favor of the Nollans, repeating the standard it [redacted]iously articulated:

> [redacted] commission's authority to impose public access requirements as a condition to permit approval is limited to situations where, subsequent to an evidentiary hearing, it is shown that the applicant's proposed development will have an adverse impact on public access to the sea . . . ." Appendix D at 2.

The court then held that despite its biased efforts the commission on remand had not been able to produce evidence showing that the state was justified in taking property from the Nollans. Appendix D at 4-5.

The commission appealed and on January 24, 1986, the Court of Appeal reversed the trial court, holding that, as a matter of law in California, no such justification need be shown to validate an exaction of property in the regulatory context. The Court of Appeal agreed that "[h]ere the Nollans' project has not created the need for access to the tidelands fronting their property." *Nollan v. California Coastal Commission*, 177 Cal. App. 3d at 723, Appendix A at 7. But the Court of Appeal concluded:

> "Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error.
>
> . . . .
>
> "As we pointed out in *Remmenga v. California Coastal Com.* (1985) 163 Cal. App. 3d 623, 628 [209 Cal. Rptr. 628], the justification for required dedication is not limited to the needs of or burdens created by the project." *Nollan*, 177 Cal. App. 3d at 723, Appendix A at 5, 7.

The Court of Appeal then went through the analysis of what it held was the alternative justification for an exaction of property. The court determined that the commission was "required by the provisions of Public Resources Code section 30212" to demand a dedication of property from the Nollans since their property lies between the last public road and the sea, and because their reconstruction project comes within the all-inclusive definition of "development," and because there was not already adequate access nearby. 177 Cal. App. 3d at 724, Appendix A at 7-9. Having determined that the exaction carried out the mandate of Section 30212, and the legitimate purpose of the Coastal Act "to provide maximum public access to and along the coast," the Court of Appeal ended its inquiry and ordered the trial court's judgment reversed. 177 Cal. App. 3d at 724, Appendix A at 9.

In effect the decision of the Court of Appeal would uphold against a constitutional "taking" claim any legislatively authorized exaction of property which is made a condition of an otherwise valid exercise of the state's police power.

———o———

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. Introduction

In its Fifth Annual Report, issued in January, 1985, the commission reported that as of that date it had imposed uncompensated dedication requirements on 1,817 California property owners. *Coastal Access Program Fifth Annual Report,* A Joint Report of the California

Coastal Commission and the State Coastal Conservancy at 8 (January, 1985). This number has presumably grown by several hundred in the past year. Many of these dedication requirements may be justified. Many may not. In those situations where the dedication requirement is not justified, the owner currently has no recourse in the California courts. The Court of Appeal decision in *Nollan* has been published in California's official reports, along with several other similar appellate decisions dealing with the same controversy. Together, they represent the law in California that the state may acquire property for itself without compensation as a payoff for the issuance of a permit.

This case is different from the regulatory takings cases, such as *Agins v. City of Tiburon,* 447 U.S. 255 (1980), and its progeny. Here, the state is not simply regulating the owners' use of their land. Rather, the state is acquiring an interest in their land and opening their land to physical invasion for public use.

If the law espoused in this decision accurately reflects constitutional requirements the City of New York could avoid the ruling of this Court in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, by the simple device of requiring the property owner to allow the installation of cable equipment as a condition of a permit to make any repairs or maintenance on the building. Unlike the Due Process Clause, however, the Just Compensation Clause is not simply a guaranty that certain procedures will be followed before property is taken. It is a substantive guaranty that, regardless of the procedure employed, private property will not be taken for public use unless the owner is compensated.

This Court has not directly addressed to what extent, and under what circumstances, an owner may be required by the state to give away real property without compensation as a condition of receiving approval to make some use of his land. Several precedents of this Court indicate, however, that it is the loss to the owner which determines whether a "taking" has occurred. *United States v. Causby,* 328 U.S. 256, 261 (1945). It stands to reason, therefore, that since the Nollans are suffering a substantial loss of property rights, they should be entitled to some sort of meaningful "taking" analysis. This is consistent with the cases holding that the review of state action should not stop with a determination that the state validly exercised its police power. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. at 425; *United States v. Security Industrial Bank,* 459 U.S. at 74-75. Moreover, several decisions of this Court have stated that the purpose of the Just Compensation Clause is to ensure that some individuals alone are not forced to bear fully the cost of public benefits which, in all fairness, should be borne by the public as a whole. *See, e.g., Armstrong v. United States,* 364 U.S. 40, 49 (1960); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 (1978). Yet the California Court of Appeal has refused to consider the Nollans' claim that they are being forced to bear an unfair share of the cost of a public benefit because the value of the exaction of property imposed on them has no relationship to any burden imposed or benefit received as a result of their request.

B. Under California Law the State May Exact a Property Interest To Allow Physical Invasion of the Property Without Payment of Just Compensation and Without Demonstrating That the Benefits Received or Burdens Created by the Property Owner Are Directly Related to the Nature and Extent of the Property Interest Taken

Historically, the rule in California was a sound one. Representative of the early cases is *Scrutton v. County of Sacramento,* 275 Cal. App. 2d 412 (1969):

> "[C]onditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs *emanating from the landowner's proposed use." Id.* at 421 (emphasis added). *See also Ayres v. City Council of the City of Los Angeles,* 34 Cal. 2d 31, 42 (1949); *Mid-Way Cabinet Fixture Manufacturing v. County of San Joaquin,* 257 Cal. App. 2d 181, 192 (1967).

The holdings of the *Scrutton* line of cases were modified in 1971 by the California Supreme Court in *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek,* 4 Cal. 3d 633 (1971). *Associated Home Builders* involved parkland dedication from the developer of a major new subdivision. The Court found the *Scrutton* test satisfied in that the dedication requirement was reasonably conceived to fulfill a public need for additional parkland created by the new subdivision since the new subdivision brought an influx of new residents who would tax existing recreational facilities. In dicta, however, the Court indicated that a dedication requirement would be valid even if it did not meet the *Scrutton* test:

> "We do not find . . . support for the principle urged by Associated that a dedication requirement may be

upheld only if the particular subdivision creates the need for dedication.

> "Even if it were not for the authority of *Ayers* [*sic*] we would have no doubt that section 11546 can be justified on the basis of a general public need for recreational facilities . . . ." 4 Cal. 3d at 638.

As to whether a "taking" could occur under the guise of subdivision regulation, the Court stated that "the city was not acting in eminent domain . . . ." *Id.*

The first case to apply the dicta in *Associated Home Builders* to a case where the *Scrutton* test was *not* satisfied was *Norsco Enterprises v. City of Fremont,* 54 Cal. App. 3d 488 (1976). In *Norsco,* the city levied fees in lieu of a dedication of parkland against the owner of an apartment building who had converted the apartment units into condominiums. The owner argued that the mere conversion of apartment units into a condominium form of ownership did not change the population of the building and, therefore, the influx of new residents found in *Associated Home Builders* was not present.

The court held that it was unnecessary for the city to show that Norsco had contributed to the need for parkland:

> "[In *Associated Home Builders*] the high court pointed out that population growth brought about by a proposed subdivision was not the *only* justification for the statute. It rejected an argument, such as that made here, that the required land dedication or 'in lieu fees' were 'justified only if it can be shown that the need for additional park and recreational facilities is attributable to . . . the new subdivision . . . .'" *Norsco,* 54 Cal. App. 3d at 494 (emphasis in original).

Georgia-Pacific Corp. v. California Coastal Commission, 132 Cal. App. 3d 678 (1982), became the first case to apply the *Associated Home Builders* rule to an exaction of a property interest to allow public access. *Georgia-Pacific* also became the first case to extend the rule to an application for permission to *use* land, rather than an application for permission to *subdivide* land.[3]

In *Georgia-Pacific* a lumber company applied for coastal development permits to make certain improvements to its lumber mill property on the north coast of California including the construction of a visitor service facility, parking lot, helicopter pad, hangar, and related outbuildings. The commission conditioned the permits, requiring the company to dedicate specified easements to the public for access to the shoreline. The trial court struck the conditions, ruling that "the public access conditions imposed by the Commission . . . violate Article 1, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because the conditions deprive Georgia-Pacific of private property without due process of law and without just compensation, in that the scope and extent of the easements required to be dedicated by said conditions are not reasonably related to the nature and impact of the four projects proposed by Georgia-Pacific." 132 Cal. App. 3d at 689 n.7.

The Court of Appeal reversed the trial court and reinstated the conditions. The Court of Appeal recited the

---

[3] This was a significant expansion of the *Associated Home Builders* rule. Although owners have no constitutional right to subdivide land, they do have a right to make viable economic use of their land in accordance with their reasonable investment-backed expectations. *Agins v. City of Tiburon,* 447 U.S. at 260.

rule that would eventually be applied to the Nollans in the case at bar:

> "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638-640 . . . .) The 'scope and extent' of the easements required by the Commission were 'reasonably related' to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people of this State. (See § 30001.5, subd. (c).) Their relationship to the 'nature and impact' of the proposed projects was not a valid basis for the trial court's determination that the access conditions deprived Georgia-Pacific of its constitutional rights." 132 Cal. App. 3d at 699.

This language from *Georgia-Pacific* has been cited and followed in subsequent cases involving private individuals wishing to do nothing more than construct one single-family home on their one lot. *See, e.g., Remmenga v. California Coastal Commission*, 163 Cal. App. 3d 623, 628-29 (1985); *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148, 166 (1985). In *Grupe*, the court said that it would still require a finding that the applicant's project contributed "at least in an incidental manner" to the public need for more public beach. In other words, the *Grupe* court, while acknowledging *Georgia-Pacific, see* 166 Cal. App. 3d at 166 n.11, retreated slightly from *Georgia-Pacific*, ruling that it was not enough for the exaction to simply advance the purposes of the Coastal Act. It then found

that Grupe's project sufficiently contributed to the public need because the project involved new development on previously vacant, albeit private, land.

The Court of Appeal, in the case at bar, found *Remmenga* and *Grupe* controlling, *except* to the extent that *Grupe* required more than just a simple showing that the exaction advances the purposes of the Coastal Act.

> "The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission's decision.
>
> "This case and *Grupe* differ in that *Grupe* involved construction of a residence on one of the few remaining vacant lots in the area. *The difference is irrelevant.* The Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code section 30212. . . .
>
> ". . . Public Resources Code section 30212 requires public access to be provided in new development projects. . . ." *Nollan*, 177 Cal. App. 3d at 723-24, Appendix A at 7-8 (emphasis added).

Thus, the court in the case at bar, reembraced *Georgia-Pacific* and the idea that an exaction is valid when it is authorized by a statute which is a valid exercise of the police power. The inquiry ends there; it is "irrelevant" that the project makes no change in the use of the property and has no effect on existing public access.

C. Under the Just Compensation Clause, the Exaction of a Property Interest To Allow Physical Invasion of the Property for Public Use Is Invalid Without Payment of Compensation Unless the Burdens Created or Benefits Received by the Property Owner Are Directly Related to the Nature and Extent of the Property Interest Taken

The California rule, discussed above, is that permit-issuing agencies can take private property without compensation to fulfill public needs not created by the applicant, when authorized to do so by a regulatory statute. No taking analysis is owed to the applicant by the state courts, because the agency is exercising the state's police power, not its power of eminent domain. The California rule conflicts with decisions of this Court interpreting the protections of the Federal Constitution.

In several cases, this Court has stated that the evaluation of the constitutionality of a governmental act does not cease with a determination that the act was a valid exercise of the police power. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. at 425, this Court stated:

> "The Court of Appeals determined that § 828 serves . . . legitimate public purpose[s] . . . and thus is within the State's police power. We have no reason to question that determination. It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."

Again, in *United States v. Security Industrial Bank*, 459 U.S. 70, this Court repeated the rule that valid exercises of governmental power may nonetheless require compensation when property rights are affected:

> "It may be readily agreed that § 522(f)(2) is a rational exercise of Congress' authority . . . . Such agreement does not, however, obviate the additional difficulty that arises when that power is . . . used to defeat traditional property interests. The bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation. . . . Thus, however 'rational' the exercise of the bankruptcy power may be, that inquiry is quite separate from the question whether the enactment takes property [so as to require compensation]." *Id.* at 74-75.

The government's authority to take property is not separate from the police power. It is simply a part of the police power. The police power is the power of government to serve the people for which it exists. *Sporhase v. Nebraska, ex rel. Douglas*, 458 U.S. 941, 956 (1982). The police power authorizes government to undertake any measure deemed necessary, by the people's elected representatives, to benefit the public health, safety, or welfare. *Andrus v. Allard*, 444 U.S. 51, 59 (1979); *Eiger v. Garrity*, 246 U.S. 97, 102-03 (1918). The government's authority to take or damage private property for the benefit of the public welfare is thus simply a subsidiary power of the government's overall police power. *Hawaii Housing Authority v. Midkiff*, — U.S. —, 81 L. Ed. 2d 186, 196 (1984); *Berman v. Parker*, 348 U.S. 26, 31-32 (1954). As far back as *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court rejected the idea that the guaranty against uncompensated takings could be "qualified by the police power." *Id.* at 415. If this were the rule, wrote the Court, "the natural tendency of human nature is to extend the qualification more and more until at last private property

disappears." *Id.*[4] "But," said the Court in *Pennsylvania Coal,* "that cannot be accomplished in this way under the Constitution of the United States." *Id.*

Section 30212 was admittedly enacted to benefit the public welfare. As the Court of Appeal found in the case at bar, Section 30212 serves "the stated purpose of the Legislature in enacting the Coastal Act to provide maximum public access to and along the coast." *Nollan,* 177 Cal. App. 3d at 724, Appendix A at 9. The Nollans concede therefore that it is within the state's police power to take private property to obtain expanded public access along the coast. As *Loretto* and *Security Industrial Bank* point out, however, it is a separate question whether the statute's application to the Nollans would require the payment of compensation. And the duty to address that question cannot be avoided by a conclusion that the state used its police power. Thus, the Nollans were entitled to a meaningful "taking" analysis, not just a determination that their project fell within the parameters of an otherwise valid statute.

D. Under Constitutional Standards the Exaction of Public Access from the Nollans Is Invalid Without Payment of Just Compensation

> "In general it is not plain that a man's misfortunes or necessities will justify his shifting the damages to his neighbor's shoulders . . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. at 416.

---

[4] This natural tendency of human nature can be observed in the evolution of the California rule discussed in the preceding section. The rule at first applied only to large developments and came as a condition to receiving a governmental privilege to subdivide. The courts have acted "to extend the qualifications more and more until at last" it applies to single-family homeowners and comes as a condition to reconstructing a single-family residence with no change in use.

This Court has stated on several occasions that the purpose of the guaranty of just compensation is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. at 49; *Penn Central Transportation Company v. City of New York,* 438 U.S. at 123; *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 83 (1980); *Agins v. City of Tiburon,* 447 U.S. at 260.

In the case at bar it is inconceivable that the Nollans' replacement of a single house, entirely on private property, has created the public need for additional state-owned beach in Ventura County. No findings that such an effect occurred were made by either the commission or the courts below. The trial court twice found that any need for additional access along the coast could not be attributed to the Nollans' action. These factual findings were not disturbed on appeal. The Court of Appeal reversed on the basis that "a direct burden on public access need not be demonstrated." Appendix A at 5. It is clear from the facts that any public need for additional state-owned beach was a preexisting need that, "in all fairness and justice, should be borne by the public as a whole."

In applying the various tests for determining when a "taking" has occurred, this Court has paid particular attention to "the character of the governmental action."

Kaiser Aetna v. United States, 444 U.S. 164, 175 (1979); *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. at 426. In the latter case, this Court stated:

> "'A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some [regulatory] program . . . .'" *Loretto,* 458 U.S. at 426 (quoting *Penn Central,* 438 U.S. at 124).

The exaction of real property from the Nollans is not regulation; it does not merely limit what they can do with their land. To the contrary the Nollans are being required to give up to the government a recognized property interest (the right to exclude others) and to suffer a physical invasion of their residential property. The sole purpose of the "access" requirement is to provide for the public in general to enter upor the Nollans' residential land. The public has preempted the Nollans' right to private enjoyment of the property they purchased. The Nollans must tolerate public use and occupation of their property to whatever degree each day may bring, and, at the end of the day, must clean up after the public.

This Court has also held that "the right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,'" *Ruckelshaus v. Monsanto Co.,* — U.S. —, 81 L. Ed.2d 815, 838 (1984); *Kaiser Aetna v. United States,* 444 U.S. at 176, and is one that generally cannot be taken without compensation. *Kaiser Aetna,* 444 U.S. at 179-80. There are no unique facts or equities in the case at bar that would warrant a departure from the above general rule. Such unique facts or equities are found only when the

project itself creates the need for more publicly owned land, by diminishing the supply of, increasing demand for, or interfering with access to existing public land. This principle was referred to by this Court in *National Cable Television Association v. United States,* 415 U.S. 336 (1974). In that case the Court discussed the difference between a tax and a fee. Taxes were characterized as a nondelegable legislative function which could be levied arbitrarily, in that the amount assessed need not bear any relationship to the benefits received from government or the individual's contribution to public needs. 415 U.S. at 340. The Court held that the power to tax cannot be exercised by administrative agencies. *Id.* at 340. 342. Fees, which *can* be levied by administrative agencies, in order to avoid being declared an invalid tax, must *not* be arbitrary. That is, they must be rationally related to a special benefit bestowed upon the applicant, a public need caused by the applicant, or the agency's direct costs of regulating the applicant. *See id.* at 340-42. To conclude otherwise, said the Court, "carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* at 341.

The property exacted from the Nollans in the case at bar is the same as a "fee." The state has simply taken its fee "in kind." The size of the fee was exceptional. The state took one-third of the Nollans' property and *all* of their sandy beach. There was no attempt by the commission or the California courts to quantify any contribution by the Nollans to this general, preexisting public need nor to relate the contribution by the Nollans (if any) to the amount of the exaction. In point of fact, the Nollans

have not contributed to the public need. Taking property from the Nollans cannot therefore be justified as a fee for anything they have done, or received. It is an acquisition of private property that can only be accomplished with the payment of compensation.

—o—

CONCLUSION

The California courts have created a handy fiction which makes it possible for the state to acquire private property without paying for it, while the courts look the other way. When a confiscation of land reasonably relates to the purpose of a statute, it is considered a valid exercise of the police power, not an act of eminent domain. Individuals whose property is taken pursuant to a statute are, under this rule, denied a "taking" analysis when the validity of the exaction is challenged in the California courts. The Nollans are victims of this rule. Under federal constitutional law they were entitled to a meaningful "taking" analysis based on the effect the reconstruction of this house would have on public access along the coast. That analysis would show no relationship sufficient to justify the exaction of one-third of their property without payment of just compensation. They request this Court to grant a hearing in this case to clarify the legal standards under the Fifth and Fourteenth Amendments which limit actions by the state to exact from property owners without payment of compensation a right of physical entry by the public onto their residential property.

DATED: July, 1986.

Respectfully submitted,

Of Counsel

TIMOTHY A. BITTLE
JOHN H. LEE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
ROBERT K. BEST
COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

APPENDIX A

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

JAMES PATRICK NOLLAN and MARILYN NOLLAN,

Petitioner and Respondent,

v.

CALIFORNIA COASTAL COMMISSION

Respondent and Appellant.

2d Civil No. B-004663
(Super. Ct. No. SP50805)
(Ventura County)
O R D E R
(Filed February 18, 1986)

THE COURT:

The opinion in the above entitled matter, filed on January 24, 1986, was not certified for publication in the Official Reports.

For good cause, it now appears that the opinion should be published in the Official Reports.

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SIX

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,

Petitioner and Respondent,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent and Appellant.

2d Civil No. B-004663
(Super. Ct. No. SP50805)
(Ventura County)
(Filed January 24, 1986)

Appeal by California Coastal Commission (Commission) from judgment granting a peremptory writ of mandate to James and Marilyn Nollan (the Nollans). In its judgment the trial court held invalid the Commission's conditional approval of a coastal owner's development project. The condition imposed required the owners to provide lateral access to the public to pass and repass across the property between the mean high tide line to the toe of a revetment located on the property. The judgment ordered the Commission to issue the permit without the condition. We reverse the trial court and affirm the decision of the Commission.

The Nollans own a lot on the beach in the Faria Beach Tract in Ventura County. On March 1, 1982, they applied for a coastal development permit to demolish a 521 square foot, one bedroom, one story, substandard beach house located on their lot. The Nollans proposed to replace it with

a two-story, three bedroom, 1674 square foot residence with attached two car garage. Their stated intention is to live in the new residence permanently in contrast to the limited occasional vacation use by them and renters of the smaller structure.

The Commission placed the Nollans' application on what is known as the administrative permit calendar and approved it on April 7, 1982, with a condition requiring lateral public access. The Nollans objected to that condition and requested a full public hearing. This request was denied.

The Nollans then filed a petition for a writ of mandate. On January 18, 1983, after a hearing, the court ordered that a "writ of mandate shall issue from this court, remanding the proceedings to respondent and commanding respondent to set aside its decision of April 7, 1982 . . . and set the matter for a full evidentiary hearing."

Upon remand a full public hearing was held before the Commission. At the conclusion of the hearings, the Commission approved the Nollans' application permit again with the condition requiring lateral public access.

The Nollans filed a supplemental petition for writ of mandate. The trial court issued a peremptory writ commanding the Commission to issue the permit without the condition requiring public access. The Commission appealed.

Standard of Review

When the decision of an administrative agency neither involves nor substantially affects a fundamental vested

right, the standard of review in both the trial and the appellate court is whether the findings are supported by substantial evidence. (*Georgia-Pacific Corp.* v. *California Coastal Com.* (1982) 132 Cal. App. 3d 678, 697.) The Nollans did not have a preexisting right to unregulated new construction. Since they were given the right to construct, the only question that remains is the reasonableness of the condition attached. We therefore review the administrative record to determine whether the Commission's decision is supported by substantial evidence in light of the whole record. (*City of San Diego* v. *California Coastal Com.* (1981) 119 Cal.App.3d 228, 232.)

Evidence

There is substantial evidence to support the decision of the Commission. The evidence considered by the Commission consisted of the following: Reports on 12 permits for demolition and reconstruction of single family residences in the Faria Beach tract and four other permits, the state-wide interpretative guidelines on access, a Ventura beach study (which includes Faria beach), testimony from citizens, a report on an investigation of the existence of public rights acquired through implied dedication at Faria, including declarations by surfers who frequent Faria beach, excerpts from surfing publications about the area, a commission study on coastal access in San Diego, a study of cumulative impacts on shore-zoned development at Lake Tahoe, a hand book on coastal recreation for planners, three articles on coastal access problems encountered in other states, and a beach user study component of the Santa Monica Land Use Plan as well as slides, plans and documents submitted by the Nollans and Mr. Nollan's testimony.

All this mass of evidence was and could be considered. The Commission may consider opinion evidence of experts, oral presentations at the public hearing, photographic evidence and writ materials prepared by its staff. (*City of Chula Vista* v. *Superior Court* (1982) 133 Cal.App.3d 472).

The trial court found that the evidence did not support a finding that the Nollans' project would create a "direct or cumulative burden on public access to the sea." Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error.

Discussion

In *Grupe* v. *California Coastal Com.* (1985) 166 Cal. App.3d 148, 165, the court construed the leading California case on the constitutionality of exactions, *Associated Home Builders, etc., Inc.* v. *City of Walnut Creek* (1971) 4 Cal.3d 633, to hold that only an indirect relationship between an exaction and a need to which the project contributes need exist. We agree with the *Grupe* reasoning.

In *Grupe* the landowner owned one of six remaining undeveloped beach front lots in a group of twenty-nine adjacent lots in Santa Cruz County. The 29 lots were located between two beaches open to public use. Grupe applied for a permit to build a large single family residence to be located behind a cement wall on his lot. The Commission approved the permit subject to a requirement that Grupe offer to dedicate a public access easement between mean high tide and the cement wall.

The court in *Grupe* held that the access condition was related to a need for public access to which Grupe's project

contributed, even though standing alone it had not created the need for access. The court reasoned the project was one more brick in the wall separating the people of California from the state's tidelands. (*Id.* at p. 168.)

The *Grupe* court also held that the exaction did not constitute a "taking" because although it caused a diminution in the value of Grupe's property, it did not deprive him of the reasonable use of his property. (*Id.* at pp. 175-176.)

As we pointed out in *Remmenga* v. *California Coastal Com.* (1985) 163 Cal.App.3d 623, 628, the justification for required dedication is not limited to the needs of or burdens created by the project. Here the Nollans' project has not created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access. The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission's decision.

This case and *Grupe* differ in that *Grupe* involved construction of a residence on one of the few remaining vacant lots in the area. The difference is irrelevant. The Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code section 30212. That section provides that new development does not include the demolition and reconstruction of a single-family residence if the reconstructed residence does not exceed either the floor area, height or bulk of the former structure by more than 10 percent and the reconstructed residence is sited in the

same location on the effected property as the former structure. The Nollans' proposed new single-family residence exceeds the floor area, the height and bulk of the former structure by more than 10 percent and is not sited in the same location as the former structure. It is, therefore, new development as was the residence in question in the *Grupe* case.

The Nollans contend that since there is public access one-quarter to one-third of a mile in one direction and 1800 feet in the other direction from their property, adequate access exists within the meaning of that section. Public Resources Code section 30212 requires public access to be provided in new development projects except, among other things, where adequate access exists nearby.

The Nollans' property lies in an area where numerous dedications for public access have been made on nearly all the beach front parcels. Furthermore, there is no access to tidelands and the sea directly in front of the Nollans' lot, except by trespassing or boat at high tide. A limitation on the Commission from imposing lateral access in this case is contrary to the stated purpose of the Legislature in enacting the Coastal Act to provide maximum public access to and along the coast. The access in *Grupe* appears to be nearer to the landowners' property than in the instant case. This contention of the Nollans lacks merit.

The Nollans claim that since the Commission did not appeal when the superior court made its first order issuing a peremptory writ of mandate striking the condition, that order became the law of this case and that it is immune from collateral attack. Neither doctrine applies here.

When it issued its first peremptory writ, the trial court, among other things, remanded the proceedings to the Commission for a public hearing. At the public hearing on remand a mass of evidence was presented to the Commission. The record was changed substantially. The original Commission decision was made in an administrative permit context and no findings were made, no evidence was in the record other than the application, submissions and the executive director's statement of reasons and no hearing was held. When a record is changed in any substantial respect the law of the case doctrine does not apply. (*Marsh* v. *Workmen's Comp. App. Bd.* (1968) 257 Cal. App.2d 574, 581.)

The application of either the doctrine of law of the case or collateral estoppel here would result in a substantial injustice since the rulings of the trial court were made before *Remmenga* and *Grupe* were decided. Both of those decisions clarified the law on the subject of the right of the Commission to impose conditions on issuing permits for new development.

"It is fundamental that the point relied upon as law of the case must have been ***necessarily involved*** in the case. Accordingly, a *dictum* is not binding. . . ." (6 Witkin, Cal. Procedure (2d ed. 1971) § 647, p. 4564.) Having determined to remand the matter for an evidentiary and public hearing, the balance of the orders made by the court in its first peremptory writ were dicta and the doctrine of law of the case does not extend to dicta. (*Stockton Theatres Inc.* v. *Palermo* (1956) 47 Cal.2d 469, 474.)

The judgment is reversed and the matter remanded with directions to deny the petition for writ of mandate.

NOT TO BE PUBLISHED.

ABBE, J.

We concur:

STONE, P. J.
GILBERT, J.

William L. Peck, Judge
Superior Court County of Ventura

John Van de Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General, Jamee Jordan Patterson, Deputy Attorney General, for Appellant.

Ronald A. Zumbrun, Robert K. Best, Timothy A. Bittle, Respondents.

APPENDIX B

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL
2nd District, Division 6, No. B004663

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

NOLLAN et al., Respondents,

CALIFORNIA COASTAL COMMISSION, Appellant.

(Filed April 30, 1986)

Respondents' petition for review DENIED.

BROUSSARD
Acting Chief Justice

APPENDIX C

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION SIX

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

2 Civ. No. B004663

(Filed May 14, 1986)

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

RONALD A. ZUMBRUN
ROBERT K. BEST
TIMOTHY A. BITTLE
JOHN H. LEE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Appellants

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

NOTICE IS HEREBY GIVEN that James Patrick Nollan and Marilyn Harvey Nollan, the appellants above-named, hereby appeal to the Supreme Court of the United States from the final judgment of the Court of Appeal of the State of California, Second Appellate District, Division Six, which became final May 6, 1986, petition for

review denied by the Supreme Court of the State of California on April 30, 1986. This appeal is taken pursuant to 28 U.S.C. § 1257(2).

DATED: May 9, 1986.

Respectfully submitted,

RONALD A. ZUMBRUN
ROBERT K. BEST
TIMOTHY A. BITTLE
JOHN H. LEE

By /s/ John H. Lee
Attorneys for Appellants

APPENDIX D

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,
Petitioners,

Civ. No. SP 50805

STATEMENT OF DECISION
(Filed February 15, 1984)

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

Petitioners' Petition for Writ of Administrative Mandamus will be granted as set forth below:

This is the second time petitioners' case is before this Court. The following undisputed facts appear in the administrative record. Petitioners are lessees and purchasers of a small residential lot located in the Faria Beach Tract along the coast in Ventura County. The Faria Beach Tract is a subdivision of 138 lots. Petitioners applied to the California Coastal Commission for a permit to demolish a tiny, substandard beach house now occupying the lot, and replace it with a larger house, similar to the other houses in the area, that would comply with local building, health, and safety code requirements. Petitioners' permit application was reviewed by the executive director of the commission and approved by the commission on the administrative permit calendar, subject to the condition that petitioners record a deed dedicating their entire beach seaward of their

seawall to public access, approximately one-third of their property.

Petitioners appeared before this Court in December, 1982, requesting that the commission be ordered to delete the public access condition from its approval of their permit.

The administrative record before the Court at that time contained, in addition to many other things, petitioners' permit application and additional project information solicited by the commission which, together, detailed the location, dimensions, number of rooms, and intended use of both the existing house and the proposed house.

Petitioners argued, and this Court agreed, that under the California Coastal Act, Public Resources Code §§ 30000, *et seq.*, the commission's authority to impose public access requirements as a condition to permit approval is limited to situations where, subsequent to an evidentiary hearing, it is shown that the applicant's proposed development will have an adverse impact on public access to the sea, and even then only if adequate access is not already available. This Court's statement of decision stated in part: "A valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access. Such evidentiary showing should either demonstrate immediate impact or verifiable, nonspeculative cumulative impact." This Court then concluded that no such burden on public access was demonstrated by the facts in the administrative record.

The respondent persuaded this Court that the case should be returned to the commission for a public hearing. Accordingly, on January 18, 1983, this Court issued its

peremptory writ of mandate ordering the commission to hold a public hearing on petitioners' application and make proper evidentiary findings in accordance with the statement of decision.

This Court's ruling was not appealed and thus became part of the law of this case.

The commission opened the mandated hearing on April 28, 1983, but continued the hearing to May 26. The staff neglected to include this Court's statement of decision among the 17 "substantive file documents" listed in its April report. This Court's statement of decision was finally placed, at petitioners' urging, before the commission at the May 26 hearing and is included in the administrative record. The revised staff report presented at the May 26 hearing included excerpts from this Court's statement of decision, but deleted the portion quoted above dealing with the type of evidentiary showing that had to be produced on remand. At the conclusion of the hearing on May 26, 1983, the commission voted to approve petitioners' permit, again subject to the identical condition requiring petitioners to dedicate their beach to public access.

On June 23, 1983, after the May 26 vote was taken, the commission held another hearing, to revise its findings. There is a dispute between the parties as to whether petitioners were given notice of this hearing, but no dispute that petitioners were not present.

Petitioners are again before this Court, complaining, among other things, that the commission did not comply with this Court's prior writ of mandate and that the condition requiring a dedication of access is still unjustified.

This Court agrees.

I

This Court's order stated that the commission, in order to require a dedication of access from petitioners, must first make an evidentiary showing of direct and definable adverse impact on public access which should either demonstrate immediate impact or verifiable, nonspeculative, cumulative impact.

A review of the administrative record indicates that the commission's own staff were petitioners' principal adversaries on remand, improperly assuming the role of advocates. In response to the Court's order the commission's staff supplied the commission with books and articles about access problems in other states, the impact in general of new subdivision building in previously undeveloped areas, a draft land use plan for Santa Monica, mimeographed form declarations from some surfers, and studies of shoreline conditions at Lake Tahoe. The staff report contained speculation that replacement housing "would present a psychological barrier to the public" and might someday lead to the construction of gas stations, stores, and restaurants. The staff report discussed the disposition made on other, unrelated permit applications and included as exhibits a letter and two photographs of a different part of the coast, submitted four years earlier in an unrelated proceeding. This type of evidence is either not specific to the Nollan property or too speculative in nature to support a finding that this project, by these petitioners, will create a direct or cumulative burden on public access to the sea.

In addition to this "new evidence," the staff report discusses the size, lot position and lot coverage, number of rooms, and intended use of petitioners' proposed replacement house. This information, however, was contained in

the prior record which was before this Court when it issued its first writ of mandate.

Since no appeal was taken from this Court's first decision, which held that the evidence in the record did not support a finding that petitioners' proposed development would burden the public, the same decision is compelled by the fact that no new evidence of any relevance has been added to the record this time around.

II

Public Resources Code § 30212 states that "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where . . . (2) adequate access exists nearby . . . ."

To the extent Section 30212 allows the imposition of dedication conditions, it does so only when the development is a "new development project"—it does not empower the commission to impose dedication conditions whenever a permit may be required.

The commission points out that Subsection (b) of Section 30212 lists a variety of improvements to property which the Legislature has specifically indicated are not "new development projects," including demolition and reconstruction of a single-family residence where the reconstructed dwelling is not more than 10% larger. The commission thus urges the conclusion that any development not specifically exempted by this list must be characterized as a "new development project" and be required to surrender access.

As this Court reads the Coastal Act, however, the commission's interpretation does not harmonize with the rest of the Act. In a case such as petitioners', a 10% enlargement of their tiny house would barely be enough to add a good-sized closet to their old floorplan, and would still leave their new home out of character for the neighborhood and uncomfortably small for an average family. A test for the imposition of access requirements which automatically required a dedication of access for any reconstruction exceeding 10% of the former structure would be unreasonably harsh and would not square with the apparent meaning given by the Legislature to the term "new development projects."

In its earlier statement of decision, this Court stated:

> "Though the Legislature intended that the construction of single-family residences on vacant lots be considered new development subject to the access requirements of section 30212, it did not intend that the expansion or enlargement of existing residences be considered new development absent a showing that they had an individual or cumulative adverse impact on public access to the sea."

This seems to be the better interpretation of Section 30212, since it avoids issues of constitutionality inherent in the automatic test proposed by the commission.

Thus, this Court concludes that since the record does not support a finding that petitioners' project would burden public access, the project does not fall within the definition of "new development project."

III

As noted above, Public Resources Code § 30212 authorizes the exaction of access from new development projects "except where . . . (2) adequate access exists nearby." Section 30212 thus creates a two-part test. Access cannot be exacted where an improvement to property is not properly classifiable as a "new development project." Even when a project does qualify as new development, however, access cannot be exacted if adequate access already exists nearby. Apart from the number of other public beaches in the north county area, the commission staff report finds that "Faria County Park is located between one-quarter to one-third of a mile upcoast, and the Cove Beach area is located approximately 1,800 feet downcoast."

The only way access could be found to be inadequate in a case like this would be if the Coastal Act required public beaches, where separated, to be connected. This Court does not consider such to be a fair reading of the Act, however, since until all beach property is made public, there will always be a separation between public beaches.

IV

In ruling on the above matters, this Court expressly reserves judgment on certain other matters raised by the pleadings. In particular, no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in petitioners' beach have been acquired through prescriptive use. Similarly, this Court reserves judgment on whether the commission failed

to act in a timely fashion on remand, whether the commission's interpretive guidelines are valid as applied, and on other issues not expressly addressed above.

Judgment in accord with this decision shall be entered ordering a peremptory writ of mandate to issue from this Court, directing respondent to strike the conditions from petitioners' coastal development permit, and to extend petitioners' permit, free of conditions, for a period of two years from the date the judgment is entered.

Petitioners shall have their costs. Petitioners have also requested attorneys' fees pursuant to Government Code § 800, and Code of Civil Procedure § 1021.5. Petitioners shall be awarded their reasonable attorneys' fees under Government Code § 800 in an amount of $1500.00.

DATED: Feb. 10, 1984.

/s/ WILLIAM L. PECK
Judge of the Superior Court

APPENDIX E

CALIFORNIA COASTAL COMMISSION
631 Howard Street, San Francisco 94105 — (415) 543-8555

STAFF: NC/JT/PM/ND

HEARING DATE: 6/21-24/83

COURT ORDERED REMAND
STAFF REPORT and RECOMMENDATION
REVISED FINDINGS

APPLICATION NUMBER: 4-82-90

APPLICANT: James P. and Marilyn H. Nollan
407 South Mansfield
Los Angeles, CA 93030

Faria Beach Trust
P.O. Box 1178
Ventura, CA 93002

PROJECT: Demolish existing single family dwelling; construct two-story, single-family dwelling on an oceanfront lot.

Lot Area:	2,800 sq. ft.
Building Coverage	1,236 sq. ft.
Pavement Coverage:	1,168 sq. ft.
Landscape Coverage:	396 sq. ft.
Parking Spaces:	2 (covered)
Zoning:	R-B
Plan Designation:	High Density Residential
Project Density:	16 du/ac
Ht. Abv Fin Grade:	25 feet

SITE: 3822 W. Pacific Coast Highway
Faria Beach
County of Ventura
(APN: 060-380-160)

SUBSTANTIVE FILE DOCUMENTS:

1. Coastal Commission Permit Nos. 4-82-28C, 4-82-262, 4-82-135, 4-82-104, 4-28-29, 4-82-464, 4-81-463 (Demolition and reconstruction of single family residences).
2. South Central Coastal Regional Commission Permit Nos. 217-13, 211-21, 208-34 (Demolitions and reconstruction of single family residences that increased floor area and bulk/recorded deed restrictions).
3. Coastal Commission Appeal Nos. 172-79 and 173-79 and Regional Nos. 203-25 and 203-26 (Faria Family & Basso, Green, Dietrick and Faria Family & Lindsey).
4. Statewide Interpretive Guidelines, May 5, 1981 "Public Access".
5. Regional Commission Nos. 192-09 and 195-33 (Moran and Mobley).
6. *Coastal Zone '80: The San Diego Regional Coastal Access Study,* Dennis Prescott.
7. *Coastal Zone '80: Beach Access Problems Programs and Progress,* David Brower.
8. Santa Monica Draft Land Use Plan, 1980.
9. *Coastal Recreation: A Handbook for Planners and Managers,* Robert B. Ditton and Mark Stephens.
10. *The Cumulative Impacts of Shorezone Development at Lake Tahoe,* Phillips Brandt Reddick, McDonald and Grefe.
11. *Coastal Zone Management Journal — Environmental Resources and Law,* Marc J. Hershman.
12. *Recreational Access to the Coastal Zone,* Sea Grant Marine Advisory Program.
13. Minutes of the April 28, 1979 Regional Commission hearing of Permit Nos. 203-25 and 203-26.
14. Appeal No. 101-79 (Remminga).

DATE OF COMMISSION ACTION:	May 26, 1983 in Santa Barbara
COMMISSIONERS VOTING "YES":	Callahan, Franco, Grossman, King, MacElvaine, McNeil, Shipp, Wornum, Holmdahl and Chairman Nutter
COMMISSIONERS VOTING "NO":	McMurray and McInnis

SUMMARY

The applicants are proposing to demolish a one-story, single-family residence, and to construct a two-story, single-family residence with attached two-car garage. The new development will result in 3 times the lot coverage than that of the previous structure. Staff is recommending the subject development is "new development" and can be approved subject to conditions requiring a lateral access deed restriction, a waiver of public liability deed restriction and an agreement by the applicant that it will not prejudice any subsequent assertion of public rights (i.e., prescriptive rights, public trust).

STAFF NOTE:

This application for the demolition and reconstruction of a single family residence was remanded by the Ventura County Superior Court which had reviewed the applicant's petition for administrative mandamus. The Commission had approved the application through its administrative permit procedures, subject to a requirement of a lateral access deed restriction. The Court found this action was not supported by substantial evidence in the administrative record, and remanded the matter for Commission hearing and further action consistent with the Statement of Decision, dated January 18, 1983 (Attachment A). The Court's decision indicates that the Commission may require a grant of public access, but only when the facts demonstrate

that a proposed development will place a burden on public access to the coast.

The staff recognizes and respects the Court's considered decision. However, after full review of the facts related to this development request, as well as review of literature on public access to the shoreline, including prior permit decisions, interpretative guidelines adopted by the Commission and recreation/access planning documents, the staff believes the Commission should find the replacement and increase in size of residential lot coverage proposed by the applicant would change the intensity of existing private residential use on the subject site. This change in use would create adverse impacts, both individually and cumulatively on the public's ability to visit state tidelands which exist south of the applicant's development site. These adverse impacts on access should be mitigated by public access benefits, consistent with Sections 30210-30214 of the Coastal Act of 1976. In addition, the Commission has a long precedential history of requiring lateral access deed restrictions of new development projects in the subject beach tract which can be determined to adversely impact public access.

In light of the facts of this case, of the results of research regarding the need for and impacts on public recreational and access opportunities, and of the strong constitutional and statutory policies urging maximum public access to the beach, the staff believes the Commission's action on the subject request must reflect the Commission's past and present policy regarding new development situated between the sea and the first public road. The staff further believes the Court would have reached the same conclusion in viewing the applicant's case, had the administrative record contained the findings proposed in this staff recommendation, and the information and analysis upon which they rest. For these reasons, the staff recommends the Commission approve the development request subject to a condition requiring a lateral access deed restriction to be recorded by the applicants.

The Commission staff asked the State Lands Commission staff for information regarding the boundary between public and private lands on the project site because preliminary research indicates the residence may be located seaward of the mean high tide line. (See, e.g. Attachment B). The shoreline photographed in Attachment B is not the shoreline in front of the applicants' site. The shoreline is north of the Faria Beach Tract nearer to Rincon, and is offered as an informational tool to demonstrate that the historic location of the mean high tide line along the Ventura County coast has changed substantially, in some instances. As of this writing the study is not complete. Therefore, the findings proposed in this staff recommendation are based on the policies of Chapter 3 of the Coastal Act without regard to the possibility that the applicant is proposing development on public land.

STAFF RECOMMENDATION

The staff recommends the Commission adopt the following resolution:

I. *APPROVAL WITH CONDITIONS*

The Commission hereby *grants* a permit for the proposed development subject to the conditions below, on the grounds that, as conditioned, the development will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, is located between the sea and the first public road nearest the shoreline, is in conformance with the public access and public recreation policies of Chapter 3 of the Coastal Act and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. *CONDITIONS*

This permit is subject to the following conditions:

STANDARD CONDITIONS: (See Exhibit A)

SPECIAL CONDITIONS:

1. Prior to the transmittal of a permit, the applicant shall record, free of prior liens except tax liens, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject property in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution.

Waiver of Public Liability

2. Prior to the transmittal of a permit, the applicant shall submit to the Executive Director a deed restriction, for recording free of prior liens except for tax liens, that binds the applicants and any successors in interest. The form and content of the deed restriction shall be subject to the review and approval of the Executive Director. The deed restriction shall provide (a) that the applicants understand that the site is subject to extraordinary hazard from waves during storms and the applicants assume the liability from those hazards; (b) the applicants unconditionally waive any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; and (c) the applicants understand that construction in the face of these known hazards may make them ineligible for public disaster funds or loans for repair, replacement, or rehabilitation of the property in the event of storms.

Public Rights

3. The applicant shall, by accepting the terms and conditions of the permit, agree that issuance of the permit and completion of the authorized development shall

not prejudice any subsequent assertion of public rights, (i.e., prescriptive rights, public trust, etc.)

III. *FINDINGS AND DECLARATIONS*

The Commission finds and declares as follows:

A. *Project Description/Permit History.* The applicant proposes to demolish an existing 521 sq. ft., one-story, single-family residence and to construct a two-story, single-family residence (1,674 sq. ft. of liveable space) with attached two-car garage. The proposed development would result in 2,464 sq. ft. of lot coverage by the new enlarged residence and accessory residential structures. There is an existing rock seawall in front of the residence on its southern border. No construction would occur on the existing seawall, although the proposed development would move residential structures further seaward toward the existing seawall (Exhibit 1, 2 and 3).

The proposed project is located in the Faria Beach area of Ventura County where the Commission has granted several coastal development permits for demolitions and constructions of new, larger residential structures and/or shoreline protective devices. The Faria Beach Tract contains 138 lots which have been leased for various terms and conditions. The Faria family has divested its interest in the land and sold the beach front tract to the Faria Beach Trust, which is comprised of lessees and homeowner association members. Each lessee has been given the option to purchase his/her respective leased lot. The lessees were also given specified time limits to bring remedy violations of the building code standards. The applicants' project site is Lot No. 59 in the subject beach tract. The Faria Beach Trust is the record owner of the Faria Rincon Beach Colony of Ventura, and the Nollans own Lot No. 59 as trustors and beneficiaries under a Trust Agreement dated May 27, 1983. The South Central Coastal Regional Commission and the State Commission have considered approximately 60 coastal development permit requests in the Faria Family Beach Tract. Approximately 43 of the

permit request were approved subject to conditions requiring deed restricted provisions for lateral access along the shoreline. Fourteen permit requests were processed prior to changes in the Commission's Administrative Regulations pertaining to joint application of owner and lessee. The remaining permits were for development situated on inland, not shorefront lots within the tract, which contains a total of 138 leased lots.

The Commission's use of a condition requiring deed restricted lateral access in the Faria Tract dates from June 19, 1979 when the Commission heard Appeal Nos. 172-79 (Faria Family/Basso, Green and Dietrick) and 173-79 (Faria Family/Lindsey). The Commission determined no substantial issue had been raised, and by that action sustained the South Central Coast Regional Commission's use of deed restrictions in lieu of offers to dedicate easements to achieve Chapter 3 public access consistency in the subject permit actions. The Regional Commission had found that deed restrictions were appropriate due to the particular nature of the Faria Tract. The Faria family had previously dedicated land for an oceanside public park, Faria County Park (Exhibit 3). In addition, the Faria family and their lessees had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and re-pass lateral access along the shore (During the Regional Commission hearings, the Faria family representative stated that the public has had lateral access rights as described by permission of the Faria family). Finally, the Faria Tract has been in a lease-hold situation since the early part of this century. The lessee applicants could not grant public access dedications on land belonging to someone else. Thus, the Regional Commission determined that the use of deed restrictions for provisions of access was appropriate.

The application was filed on March 1, 1982 and the applicants on an Administrative Permit Calendar, received approval for the proposal with conditions on April 7, 1982.

The conditions included a requirement for a lateral access deed restriction, a waiver of public liability, and an agreement on public rights. The lateral access condition specifically required the applicants to record a deed restriction acknowledging the right of the public to pass and repass across the subject property in an area bounded by the mean high tide line at one end and to the toe of the revetment at the other end along what is known as Faria Beach. The item was reported on the administrative calendar at the Commission meeting of April 7, 1982. Prior to the Commission meeting, the applicants requested in writing a public hearing on the project pursuant to regular permit procedures. The applicants' grounds for requesting the hearing were that the proposed lateral access deed restriction condition could only be imposed subsequent to an evidentiary hearing at which the project was shown to have a direct adverse impact on public access to the sea, and that even if such evidence could be produced, an access condition could not be imposed on the project because of the existence of adequate lateral access at a County Park which is approximately 2,520 feet to the west (Exhibit 3). The applicants also state that the Faria Trust has also given to the people of California an additional public beach area known as the "Cove" which is located approximately 1,800 feet downcoast of the subject project site.

Section 13153 of the Commission's regulations requires the vote of one-third of the appointed membership of the Commission to remove an item from the administrative calendar for individual public hearing. That vote was not achieved, and the permit was approved with conditions as reported on the administrative calendar.

The applicant rejected the Commission's access requirement and filed a petition for administrative mandamus in the Superior Court for the County of Ventura challenging the access requirement. On June 19, 1982 the Court ordered the case remanded to the Coastal Commission stating:

> ". . . The Commission may constitutionally require a grant of public access only when the facts in the

case before it demonstrates that a proposed development will place a burden on public access to the coast . . . although the house that will be built by petitioners is nearly three times as large as the small house now on the property, the *record does not show at this time* that its placement on existing residential private property will burden the public's otherwise available access to the beach . . .

Though the Legislature intended that the construction of single-family residences on vacant lots be considered new development subject to the access requirements of Section 30212, it did not intend that the expansion or enlargement of an existing residence be considered new development absent a showing that they had an individual or cumulative adverse impact on public access to the sea. This is so because the impact of construction on vacant land in fundamentally different from the impact of the enlargement or expansion of any existing use.

Inasmuch as the Legislature intended for the Commission to establish that a project which expands an existing use has an individual or cumulative adverse impact on public access to the sea before finding that it is new development within the meaning of Section 30212, it was an abuse of discretion for the Commission to refuse to set petitioners' application for a full public hearing so that an evidentiary record could be established with respect to this issue . . ." (emphasis added)

This application was originally approved under the administrative permit procedures of the Commission. The findings and declarations were brief because the conditional approval was fully consistent with past permit activity in the immediate vicinity and elsewhere which had been extensively analyzed in findings over the years, and therefore additional extensive discussion was unnecessary. Additionally, one of the applicants (Faria Trust) had complied with similar conditions imposed on similar development in the past. Therefore, the Court found a lack of substantial evidence within the administrative record to

justify the decision reached by the the Executive Director and concurred in by the Commission to impose a requirement of lateral access.

B. *Public Access*

The applicant is proposing to demolish an existing residence and to construct a residence three times as large on an oceanfronting lot. There are several Coastal Act policies contained in Chapter 3 related to shorefront development and whether or not such development would require provisions of public access for consistency with the Coastal Act:

Article X, Section 4 of the California Constitution provides:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for *any* public purpose . . . and the Legislature shall enact such law as will give the *most liberal construction* to this provision so that access to the navigable waters of this state shall *always be attainable* for the people thereof." (Emphasis added)

The Coastal Act sections which carry out the Constitutional direction on public access are 30210, 30211, 30212 and 30214 as follows:

> *Section 30210*
>
> In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners and natural resource areas from overuse

Section 30211

Development shall not interfere with the public's right of access to and along the sea where acquired through use or legislative authorization, including but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessways shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For the purpose of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) Any repair or maintenance activity for wh[ich] the commission has determined, pursuant to Sec[tion] 30610, that a coastal development permit will be required unless the regional commission or the commission determines that such activity will have an adverse impact on lateral public access along the beach. As used in this subdivision "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

Section 30214

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including but no limited to, the following:

(1) Topographic and geologic characteristics.

(2) The capacity of the site to sustain use and at what level of intensity.

(3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.

(4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

(b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner

with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

(c) In carrying out the public access policies of this article, the commission, regional commissions, and any other responsible public agency shall consider and encourage the utilization of innovative access management techniques, including, but not limited to, agreements with private organizations which would minimize management cost and encourage the use of volunteer programs.

In addition, the certified Ventura County Land Use Plan (LUP) states the following objectives and policies for achieving public access when considering requests for new coastal development. The pertinent lateral access LUP policies are:

Objective

To maximize public access to the North Coast subarea consistent with private property rights, natural resources and processes, and the Coastal Act. Also, to maintain and improve existing access, as funds become available.

Policies

Lateral

2. For all new development between the first public road and the ocean, granting of lateral easements to allow for public access along the shoreline shall be mandatory unless subsection (a) below is found. In coastal areas, where the bluffs exceed five feet in height, all beach seaward of the base of the bluff shall be dedicated. In coastal areas where the bluffs are less than five feet, the area to be dedicated shall be determined by the County. At a minimum, the dedicated easement shall be adequate to allow for lateral access during periods

of high tide. In no case shall the dedicated easement be required to be closer than 10 feet to a residential structure. In addition, all fences, no trespassing signs, and other obstructions that may limit public lateral access shall be removed as a condition of development approval.

a. Findings are made, consistent with Section 30212 of the Act, that access is inconsistent with public safety, military security needs, or that agriculture would be adversely affected, or (sic) . . .

The major public access question before the Commission is whether or not this development proposal would place a burden of the public's right of access to and along the coast which must be mitigated by a grant of public access as a condition of allowing expanded residential development on the subject parcel.

The Commission notes that new development projects for private residential purposes can have individual and/or cumulative negative impacts on public access to and along the shoreline. The Commission's own ten-year permit and planning experience has demonstrated that private development along the shoreline causes adverse impacts on the use of the state owned tidelands by the general public. This adverse impact has also been demonstrated in non-coastal areas of the state as well as in other ares of the United States. According to David J. Brower, Associate Director at the Center for Urban and Regional Studies at the University of North Carolina at Chapel Hill:

"The argument for a strong public policy encouraging public access to the nation's beaches is a simple one. There has always been a strong demand for the use of beaches, and that demand is increasing and will continue to increase for some time to come. The public now owns and/or has the right to use vast stretches of the coast. The problem is that often there is no way for the public to get to those portions of the coast that they have the right to use because it is

> separated from the nearest public road by privately owned land. The result is that many stretches of public beach are accessible only by long hikes, by boat or by trespassing on private land. This problem is becoming increasingly intense because private land that has been traditionally used by the public is being converted to more profitable uses by the owners, and in some cases accessways that have been dedicated to the public are being withdrawn. Unless there is a strong public policy to obtain new accessways and to protect existing ones, the amount of beach available to the public use will continue to decrease at the same time the demand for it is increasing.

The applicants' project would demolish an existing 521 sq. ft., one-story single-family residential structure without a garage or formalized parking area, and would construct a new two-story, three-bedroom single-family residence with attached two-car garage. The applicant states the proposed replacement dwelling would result in 1,674 sq. ft. of liveable floor space, with a 469 sq. ft. garage. The proposed development would increase lot coverage so that the results of development would create lot coverage by residential structures totalling 2,464 sq. ft. The applicant's lot is 2,800 sq. ft. in size. The new dwelling would be approximately three times the size of the existing dwelling to be demolished.

The Commission notes the proposed development would result in an increase of 10 percent or more of internal floor area, and the Commission therefore finds the applicant's proposal requires a coastal development permit.

Section 30212(a) states that public access from the nearest road to and along the coast shall be provided in "new development" projects except where it is inconsistent with public safety, military security needs, protection of sensitive resources, protection of agriculture or where adequate access exists nearby.

The next analytical determination the Commission must make is whether or not the proposed development can be

defined as "new development". The Legislature has determined that certain categories of development are not "new development" for application of the access policy contained in Section 30212. These exceptions are listed in Section 30212 of the Act, and include certain replacement, demolition and reconstruction, improvements to existing structures and certain repair and maintenance activities. The applicants' project involves demolition and reconstruction, but also increases the floor area, height and bulk of the existing residence by more than 10 percent. The new residence will extend further seaward (to the south) towards the existing seawall, and closer to adjacent residential structures on the lots located to the east and west of the subject site. The increase in size and lot coverage does constitute an increase in use of the subject land, and does warrant a definition by the Commission of being "new development" pursuant to Section 30212(b) of the Act. The Commission finds the proposed development is "new development" which generates a burden on public access opportunities and therefore, as a condition of approval, must provide a public access benefit.

The Commission finds the applicants' project as proposed would have both individual and cumulative adverse impacts on public access which must be mitigated. The existing residence occupies approximately 63% of the parcel. The proposed development would occupy approximately 88 percent of the parcel. The applicants contend the existing residence is too small for the Nollan family, and the new residence would result in more reasonable living conditions (from a small, one-bedroom house with bunk-beds and no garage to a large, three-bedroom house with covered garage.

First, the applicants propose to increase lot coverage with private residential use which, after development occurs, would present an psychological barrier to the public trying to continue use of the public tidelands situated directly south of the subject site of development. The resulting development would block existing air space through which the public can view the available shoreline from the adjacent

public road, Old Coast Highway. The project would increase lot coverage by 25 percent, is a full story of living space higher and extends further seaward toward the existing seawall. In addition, the new development would increase site coverage to the north and south adjacent to the structure located to the east, and would increase site coverage north, south and to the east of the structure located to the west. Finally, on either side of the applicants' lot existing dwellings have been removed. New, larger replacement dwellings have been approved for these lots with imposition of a condition requiring consent to public access. Cumulatively, replacement construction will block existing visual access from Old Coast Highway.

The commission has determined in past permit decisions that the public is attracted to beachfront areas which are visually and physically accessible from the first public road adjacent to the beachfront area in question. If there appears to be a "wall" of residential structures, the public is prevented, psychologically after viewing the "wall", from realizing a stretch of coastline exists nearby that they have every right to visit. This Commission determination has been substantiated in other areas of planning management within the state as well. In 1977, a household survey was conducted in San Diego to compile data for a San Diego Access Study. The study demonstrated that the overall quality of a beachfront recreational area was the most important factor in deciding which beach recreational area would be visited. The study indicated that the most important reasons why beach visitors selected a certain beach area were: 1) beach quality; 2) parking availability; 3) accessibility from inland areas; and 4) lack of traffic congestion. The study conclusions indicated:

> If accessibility and parking availability are as important as indicated by these responses, substantial numbers of recreationists will search for less crowded and more easily accessible resources automatically when their traditional resources are perceived as becoming too crowded or inaccessible.

The Commission notes the study indicates that beach quality and accessibility are major factors for determining

choice of beach area. If the beach cannot be seen due to an increase in building coverage on lots which stand between the first public road and the sea, the public will search further and impact beach recreational areas elsewhere that may not be equipped to handle the extra capacity of beach use visitors. In the applicants' case, the public has the expectation that the Faria beachfront can be visited (Exhibit 4). As the applicants' residential use of the lot increases, and as other lessees expand residential building coverage on their lots, the public may get the impression that the beachfront is no longer available for public use. This is due to the encroaching nature of private use immediately adjacent to the public use, as well as the visual "block" of increased residential build-out impacting the visual quality of the beachfront.

The applicants contend that the proposed development would not increase the intensity of use on the subject parcel; they contend that the proposed development would reduce the intensity of use because the existing dwelling contains four sets of bunk-beds which could accommodate eight occupants. The proposed new dwelling would contain three bedrooms, but would be utilized by the Nollan family which totals four individuals. Because of the reduction in individual use under the Nollans' occupancy, the applicants therefore argue that the proposed development would result in a reduction in the intensity of use on the parcel.

The Commission does not agree with this contention. The existing dwelling is a vacation rental, and has functioned as such during the forty years that the Nollans have been involved in ownership or leasehold over the respective site. As a vacation rental, the existing dwelling is not committed to full-time, permanent single-family residential use; there are periods of the year when no one would be utilizing the subject site as a vacation spot due to stormy weather conditions. The proposed new dwelling may be occupied year-round initially by the Nollan family. However, there is no guarantee of how many persons would occupy the proposed structure during the life of the project. Even if

the structure is committed to full-time permanent single-family use, the applicants could sell the property to a new occupant with a larger family which could be easily contained in a three-bedroom, two-story home. Thus, although a reduction in use would occur if occupancy were to be permanently limited to four individuals, there is not guarantee that this factor of occupancy would stay constant during the entire life of the residential structure.

Further, intensity of use of a given area is not merely defined by how many individuals occupy a structure on that area. Intensity of use of a land area can be defined by actual lot coverage by residential structures and uses. The existing one-story building occupies approximately 63 percent of the subject site; thus, an increase of approximately 25 percent in the intensity of use demonstrated by lot coverage would occur. Therefore, the Commission finds the applicants' project as proposed would result in an increase in intensity of use.

The Commission notes that the Faria Beach Tract was originally a tract composed of small beach cottages which primarily functioned as vacation homes. As in other areas of the state, the secondary vacation homes are being demolished and replaced with larger, primary residential structures, which will result in an increase in demand for full-time residential services in the project vicinity. Clearly reconstruction and enlargement of houses in the Faria Beach Tract will induce additional growth in the area of Faria Beach, as it changes from a recreational beach community to one of primary residences. Facilities such as stores, gas stations and restaurants will be necessary to service the residents of the Faria Beach community. Also, housing will be required for the people who work at such facilities as well as for the people who construct houses at Faria Beach and related facilities. The people who are attached to the area because of employment as a direct result of increased residential use of the Faria Beach Tract are entitled to have access to their public tidelands. Thus the need for public access at Faria Beach is, in part, directly related to the build-out at Faria Beach. The Commission notes that this phenomena has occurred in other

portions of the state, including Malibu and Manhattan Beach.

In Santa Monica, a beach use survey was conducted in 1979 by the City for the access and recreation components of its Land Use Plan./ The Santa Monica beach users also indicated that convenience, ease of parking, lack of crowds and beach/water conditions were major factors in determining which beach area to visit. Because the Santa Monica beachfront is very accessible to the public, many of the beach users indicated they selected Santa Monica State Beach because it was easy to get to from inland areas, and appears attractive to visit.

The applicants propose to place residential structures between the seawall and the location of the existing dwelling. The existing seawall is located very near to the mean high water line. When the beach has experienced the greatest accretion during a given year, the existing seawall appears to be about ten feet away from the mean high water line. During the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall; this site phenomena has been noted by State Lands Commission staff doing preliminary boundary line investigations on the subject site. The placement of more private use adjacent to public tidelands has the potential of creating use conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is located. If the applicants' project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroachment area could result in use conflict between private and public entities on the subject shorefront, and may even result in private use being situated upon public lands.

Regardless of the boundary line issue, the Commission finds the proposed development would increase private use immediately adjacent to public tidelands which has the potential of causing adverse impacts on the public's ability to traverse the shoreline. The Commission notes that the applicants' project proposed to place more private use adjacent to the public lands can be demonstrated to have both individual adverse impacts as demonstrated above, and cumulative impacts if the entire Faria Beach Tract continues to expand as full-time residents/owners replace vacation homes with larger homes as demonstrated by the rebuilding on either side of the project site. Each new resident/owner could also place more private structures adjacent to the public tidelands which cumulatively would present an illusion of private beach to the visiting public.

The visiting public, looking for an overall beach resource experience, would be discouraged from using the beachfront or the Faria Beach Park due to the impacting nature of residential development along the shoreline. In *The Cumulative Impacts of Shorezone Development at Lake Tahoe,* the consultants studied the existing lakefront use and the potential build-out around the lakefront. The consultants also conducted lake use surveys among landowners as well as the visiting public. The study noted that "the increasing structure density that will characterize maximum buildout will significantly reduce user enjoyment in some areas of the shorezone, due largely to aesthetic impacts." The study defined the parameter for determining impact on recreational use areas:

> The sensitivity of recreational uses and aesthetic conditions to impact it defined by a variety of elements. These include such parameters as: the degree of public access; ownership of the backshore; the types and intensities of historic public use of the shorezone; the availability of alternative sites for recreation in the shorezone; and the degree of visual exposure of the shorezone to viewpoints from the lake, from along the shoreline, and from adjacent scenic highways.

The consultants indicated that:

> A change in structures at any site is thru linked to changes in the pattern and volume of recreational activities throughout the shorezone and to total use of the shorezone and Basin . . .
>
> . . . A second factor is access. Given a structural change, the degree to which people respond to it depends, in part, on extent of current use of the site and the ease with which the site can be reached. Access at Tahoe is limited, both by physical barriers and by legal questions concerning public access to areas backed by private ownership. *To an undetermined degree, shorezone structures may pose a psychological restriction to public access by implying private ownership or control over the foreshore and nearshore zones* . . . (emphasis added)

The consultants' beliefs were substantiated by the results of the surveys conducted. The User Survey indicated that respondents generally cited crowding and overdevelopment as primary impediments to their use of the shorezone. The Survey results demonstrated:

> In response to a request for general comments, a plurality (39 percent) of those responding argued for protecting the ecology of Lake Tahoe, limiting development and reducing crowding. In response to a request for suggestions concerning the more efficient use of shorezone facilities, 15 percent of respondents recommended limiting growth of crowds. Physical barriers, however, were cited by a significant number of respondents: 17.7 percent argued for more parking, 13.3 percent for more boat facilities, and 7.1 percent for more public beaches . . .

The Lake Tahoe study also examined user reactions to beaches with varying densities of use. Seventy-five percent of respondents reported they would definitely use low-density beaches.

The Commission notes that Section 30212.5 of the Act provides that wherever appropriate and feasible, public facilities shall be evenly distributed throughout a beach use area so as to mitigate against the impacts of overcrowding or overuse by the public or a given area. As private development increases along the shoreline, public use of these areas decreases. The public then travels to other areas which are already heavily utilized, and instances of overcrowding begin to occur. In the applicants' case, increased private development within the Faria tract will continue to present psychological barriers to public use of the shoreline, and less visitation may occur due to the expectation of limited use presented by close "walls" of private residential development.

In Coastal Recreation: A Handbook for Planners and Managers, produced by the U.S. Department of Commerce in January, 1976 indicated three of the major problems facing recreation resources planners and managers were: 1) peak recreation use periods; 2) the shoreline of most of the United States is in private ownership; and 3) the shore supply of existing public shoreland and access areas is near saturation. The Handbook states:

> Of the 60,000 miles of shoreline of the 48 contiguous states, only about one-third is considered suitable for recreation activities. Only 5.5 percent of this recreational shoreline is in public ownership, with 3 percent restricted for military purposes and 91 percent in private ownership . . . When the total coastal shoreline (not recreational or effective shoreline) of the 48 contiguous states is considered, less than 2 percent is in public ownership . . .
>
> . . . Not only is most coastal land in private ownership, but this land is being developed. For example, in the Recreation Element recently prepared by the South Coast Regional Commission (California) it was noted that 'roughly 20 miles of the 110 mile coast of mainland Orange and Los Angeles Counties have views blocked totally by structures.' Traditionally, land values decrease the farther one moves inland with one exception—namely, those parcels of land with view of the coast or shore. These private values, as well as the more compelling public values, are lost when visual access is blocked. The lack of visual access is particularly critical for coastal recreation activities . . . their view is their sole tie to the shore and sea . . .

The Commission finds that California's thousand mile coastline is one of her most precious and intensely used resources. Three quarters of the state's population lives within an hour's drive of the Pacific Ocean. The Commission notes that there are insufficient coastal recreational facilities to serve this population. Accordingly, each year hundreds of thousands of frustrated vacationers are turned away from coastal facilities. Moreover, hundreds of miles of publicly owned tidelands already have been walled off from the public by high-raise developments, private clubs and private residential development. (See, e.g. the following government documents for this information; California Department of Ocean and Navigation Development, *Comprehensive Ocean Area Plan and Supplement* (1971); California Department of Fish and Game, *Fish and Wildlife In the Marine and Coastal Zone* (1971); California Department of Conservation, Division of Mines and Geology, *Non-Living Resources of the Coastal Zone* (1971); California Department of Parks and Recreation *California Coastline Preservation and Recreation Plan* (1971).)

Thus, as evidenced by planning sources from other regions, public use of the shoreline can be limited by factors of private buildout, if the private buildout blocks visual access to the coastline and increased demands for full time residential support services. The Commission finds that the applicants' proposed development would present an increase in view blockage, an increase in private use of the shorefront, and that this impact would burden the public's ability to traverse to and along the shorefront. The Commission finds this burden on public access within the Faria beachfront Tract must be mitigated by some provision of public access benefit, pursuant to the public access policies contained in Chapter 3 of the Coastal Act.

The Commission must now determine what constitutes an appropriate public access requirement, in view of the applicant's proposed development, and in view of past permit procedures in the Faria beachfront tract. The Commission has previously required the recordation of lateral access deed restriction allowing the public the right of pass and re-pass lateral access along the shoreline, consistent with the Faria Family's previous approval of that form of access.

The applicants contend that Section 30212(a) provides that new development should not be required to provide public access if adequate access exists nearby and that adequate access does exist nearby. The public beach called the Cove is approximately 1800 feet downcoast from the project site (Exhibit 3). Therefore the applicants contend a provision of lateral access even if limited to pass and re-pass and in the form of a deed restriction rather than an outright offer to dedicate is not mandated by the provisions of Section 30212 of the Coastal Act.

In examining the provisions of Section 30212(a), the Commission must determine whether it is in appropriate to require such a form of lateral access. First, pursuant to the provisions of Section 30212(a), a provision of the above-described form of lateral access would not be inconsistent with public safety, military security needs, protection of fragile coastal resources or agricultural operations on the applicant's respective parcel. Further, public access is not "adequate" in the subject area.

The applicants contend that there is adequate public access because of the existing Faria County Park and the Cove beach area. They state that vertical access to and from these public areas exists, and that lateral access along the shore within park limits also is available for public use. They content that the two parks and other existing vertical accessways constitutes adequate public access pursuant to Section 30212(a) of the Act.

The Commission disagrees with the applicants' contention. The Faria County Park is located between one-quarter to one-third of a mile upcoast, and the Cove beach area is located approximately 1,800 feet downcoast (Exhibit 3). The

public has been given permissive use to travel along the shoreline within the *entire* tract by the respective owners in the past, and in several permit actions the Commission has required as conditions of approval the recordation of deed restrictions for lateral access limited to pass and re-pass along the entire shoreline, including areas beyond the park limits. The Faria Beach shoreline fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean high tide line. The Commission notes that the public does not know the exact locations of existing deed-restricted access areas, and that the public has had the expectation that lateral access so described is available in the project vicinity. The past required deed-restricted access becomes less effective if development situated between two restricted areas is not conditioned to provide a similar provision of access to compliment existing provisions. Further, the Commission notes that the purpose of access to and along the shore is not to achieve visual access to and from the first public road to and from the shoreline. Section 30212 requires that new development provide the public with the opportunity of access to and along the coast if the new development imposes a burden on existing access opportunity as does this project.

The applicants state that they have always permitted the public to pass along the shoreline adjacent to their existing dwelling. The Commission notes that the proposed dwelling will most likely have a longer life than the individuals currently proposing to re-occupy the structure and land. The Commission also notes that absent a deed restriction the Nollans cannot guarantee that access along the coast will always be freely given for the life of the proposed dwelling. The Commission finds the applicant's lot is located along a unique stretch of coast where lateral public access in inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline. At times the wet sandy beach extends up to both the applicant's and other residents' existing seawalls, preventing pedestrian passage when the tide is in. Finally, the Commission notes that there are several existing provisions

of pass and re-pass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment. The Commission therefore finds that, pursuant to the public access policies and specifically Section 30212(a), that adequate public access does not exist nearby and a deed restriction offer to allow the public pass and re-pass rights is consistent with both past Commission action and with the site's ability to provide such access. Therefore, the Commission finds the proposed development, as conditioned to provide a provision of lateral access, is consistent with Sections 30210-30214 of the Coastal Act of 1976.

3. *Prescriptive Rights—Sovereignty.* Section 30211 of the Coastal Act provides that development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization. As noted previously, there is some question as to whether or not the boundary between private and public property has been properly sited due to changes in the subject shoreline. At the request of Commission staff, a Senior Lands Agent from the Office of the Attorney General conducted an investigation into the existence of a public claim to a right of access across and passive recreational use of the area immediately seaward of existing revetments at the Faria Beach residential community. The agent also investigated public claims to access immediately seaward of the project site (Exhibit 4). The agent studied the beach area and interviewed 30 people; he received 18 declarations from users of the beach. The agent concluded:

> . . . it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not publicly owned, has been impliedly dedicated to the public for passive recreational use . . .

> . . . In my visits to the area I have interviewed 30 people . . . The individuals to whom I have spoken and the declarants include both surfers and beach hikers and bathers. All these individuals indicated to me that they have used the beach without permission from any of the adjacent owners and have always believed it to be public in nature. In addition they have indicated that they have utilized the beach in good weather year round from 1945 to the present and have observed others using it as well during those periods.
>
> Though I have not obtained any declarations from the Faria Beach residents, my conversations with some of the residents who are members of the homeowner's association, tends to confirm a long history of public use of the area in question as well as suggesting a policy by the Faria Family that such public use should not be interfered with.
>
> In summary, it is again my opinion that the area at issue, if not already publicly owned, has been impliedly dedicated to the public . . .

The Commission finds based on the signed declarations of use and on the above-cited Senior Lands Agent's opinion that there is evidence of historic public use along the shoreline in the project vicinity. In addition, the Commission finds based upon statements made by Lindsay Nielson, agent of the Faria Family, during Commission consideration of Appeal Nos. 172-79 and 173-79 (Faria Family/Basso, Green and Dietrick) beach community, that the owners of the Faria Tract have not prevented public use along the shoreline. The Commission also notes the lack of any posted signs regarding the public or private nature of lateral access along the shoreline of the subject parcel. The Commission finds that Section 30211 of the Act requires development to not interfere with the public's right of access to and along the sea where acquired through use. The Commission finds there is evidence of historical public use in the project vicinity, and, pursuant to Section 30211 that such public use shall be protected when reviewing development for consistency with the Coastal Act.

Although the applicants contend that they will permit public lateral access limited to pass and re-pass on a case-by-case basis, the Commission finds the current applicants cannot guarantee that lateral access so described will be freely given for the life of the proposed development. The applicants could post signs to make clear that public access along the shoreline is given by permission only, and that permission may be withdrawn at anytime. The Commission notes the applicant's lot has not been so posted; thus, there has been no indication to members of the public that this access use has been by consent. The Commission finds, therefore, that continued public use along the shoreline should be protected and maintained in new development proposals.

The Senior Lands Agent also investigated the sovereign nature of the site seaward of the existing revetment. He concluded that in his opinion, presently most, if not all of Faria Beach waterward of existing seawalls lies below the mean high tide level, and that the land would therefore fall in public domain or sovereign category of ownership. The agent noted that his opinion should be more definitely investigated; however, the Commission finds the possibility of possible sovereign lands on the subject site exists and should be protected for further investigation. The Commission finds therefore, based upon evidence of public use along the shoreline of the subject site, and based upon preliminary opinions about the sovereign nature of the site seaward of the existing seawall, that the proposed development must include assurances for continued lateral access across the site, limited to pass and re-pass, for the project to be consistent with Section 30211 of the Act. The special conditions provide for the recordation of a deed restriction for lateral pass and re-pass access and for non-interference by the applicant, when investigating regarding sovereignty are conducted. Therefore, the Commission finds the proposed development, as conditioned to protect for such study and to provide lateral access, is consistent with Section 30211 of the Coastal Act.

4. *Local Coastal Program.* Section 30604 of the Act provides that development shall not prejudice local governmental efforts to prepare local coastal programs that are consistent with the public resource policies contained in Chapter 3 of the Coastal Act of 1976. The Ventura County Land Use Plan was certified by the Commission as resubmitted by the County in January, 1982, and the zoning portion of the Local Coastal Program for the County was certified subject to suggested modifications by the Commission on April 28, 1983. The approved access policies previously cited in this report thus, must be considered so that the Commission can determine whether or not the subject development is consistent with the County's LCP. The County access policies call for a maximization of public access along the shoreline, and specifically indicate that for all new development between the first public road and the ocean, a lateral easement grant is appropriate to allow for public access along the shoreline, so long as consistency with Section 30212(a) is assured. The Commission has determined that the subject development can provide access pursuant to the exceptions listed in Section 30212(a); therefore, the Commission finds the subject development as conditioned to provide for a lateral access easement is both consistent with relevant access policies contained in the Coastal Act and in the County's Local Coastal Program. Thus, the Commission finds that the proposed development must provide for a lateral access easement for consistency with Section 30604 of the Act.

5. *Waiver of Public Liability—Coastal Hazards.*

Public Resources Code Section 30253 states:

> New development shall:
>
> 1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.
>
> 2) Assure stability and structural integrity, and neither create nor contribute, significantly to erosion, instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural land forms along bluffs and cliffs.

The Ventura County certified Land Use Plan states on pages 52-53, "The North Coast beaches are highly vulnerable to erosion and wave damage. Dredging operators in Santa Barbara Harbor alter sand transport downcoast. Without adequate replacement sand, high tides and waves erode the beaches. Beachside designated "communities" are losing beach front during these times, and seawalls are being undermined, critically endangering residences. Affected areas are: . . . V. Faria Beach Colony: Erosion and flooding at high tide are continuing problems. Seawalls are being undermined." The Department of Navigation and Ocean Development designated this area as "Future Use Critical".

In addition, the Ventura County Public Works Agency Flood Control District described the problems and recommendations to be considered in a Beach Erosion Study conducted by the U.S. Corps of Engineers. The Faria Beach Colony was described as follows:

6. *Faria Beach Colony:*

Problems: The beach is continually eroding, undermining the seawalls in front of the beach homes. Some of the seawalls show severe deterioration. During high waves and high tides, many beach homes are flooded from the wave splash and run-up. Many claim that historically the beach was much wider and at higher elevation.

Concern: The colony is in private ownership; however, many surfers and beach walkers use the beach. The residents are concerned by deteriorating seawalls and loss of the beach area, and would like the wider beach restored.

Recommendation: Consideration should be given to a type of seawall that will minimize the continuing erosion.

There is an existing seawall in front of the residence. The applicant has not proposed modification of the seawall but has proposed construction seaward of the existing

residence. As the project site is located in an area subject to hazards from flooding and wave action, a waiver of public liability for approving the proposed development is necessary to find the development consistent with the Coastal Act.

EXHIBITS NOT ATTACHED

APPENDIX F

PUBLIC RESOURCES CODE

§ 30212. New development projects

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not seaward of the location of the former structure.

(5) Any repair or maintenance activity for which the commission has determined pursuant to Section 30610, that a coastal development permit will be required unless

the commission determines that the activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision, "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

MOTION

Supreme Court, U.S.
FILED
SEP 15 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

NO. 86-133

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the
State of California, Second Appellate District

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

JOHN K. VAN DE KAMP
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
JAMEE JORDAN PATTERSON
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-6050

Attorneys for Appellee

INTERIM PRINTING & MAILING COMPANY
1105 WEST MORENA BOULEVARD, SAN DIEGO, CALIFORNIA 92110 – 275-3050

20pp

TABLE OF CONTENTS

	Page
STATEMENT OF THE CASE	2
I THE ISSUES PRESENTED BY THIS APPEAL ARE SO BASIC TO LONG-ESTABLISHED LAW ON LAND USE REGULATION AS TO REQUIRE NO FURTHER ARGUMENT	6
A. The Opinion of the Court Below Is Consistent With This Court's Decisions Analyzing Whether Governmental Regulation Amounts to a Taking.	7
B. The Questions Presented in This Appeal Are Narrow and Factually Specific.	9
C. Appellants Mischaracterize the Opinion of the Court Below.	9
II. APPEAL TO THIS COURT IS IMPROPER.	10
CONCLUSION	11

TABLE OF CITATIONS

Page

CASES

Agins v. Tiburon (1980) 447 U.S. 255 7

Associated Home Builders etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633 6

Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek et al. (1971) 404 U.S. 878 2,6,10

CEEED v. California Coastal Zone Conservation Com. (1974) 43 Cal.App.3d 306 3

Grupe v. California Coastal Com. (1985) 166 Cal.App.3d 148 7

Loretto v. Teleprompter Manhattan CATV Corp. (1982) 458 U.S. 419 8,9

Penn Central Transp. Co. v. New York City (1978) 438 U.S. 104 7

Penna. Coal Co. v. Mahon (1922) 260 U.S. 393 7

Remmenga v. California Coastal Com. (1985) ___ U.S. ___ [106 S.Ct. 241, 88 L.Ed.2d 250] 1,6,9

TABLE OF CITATIONS (continued)

Page

United States v. Security Industrial Bank (1982) 459 U.S. 70 8

Whaler's Village Club v. California Coastal Com. (1986) ___ U.S. ___ [106 S.Ct. 1962, 90 L.Ed.2d 648] 1,6,9

CODES

Pub. Resources Code §§ 30001.5(c), 30212 3

28 U.S.C. § 1257(2) 10

CONSTITUTIONS

Article X, § 4 Cal. Constitution 2

IN THE

Supreme Court of the United States

October Term, 1986

NO. 86-133

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the
State of California, Second Appellate District

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM

The California Coastal Commission, appellee, respectfully moves this Honorable Court to dismiss the appeal now pending, or, in the alternative, to affirm the decision of the California Court of Appeal, Second Appellate District, Division Six, on the following grounds:

A. The questions upon which the decision of the cause depends are insubstantial and do not require further argument. These same issues have previously been presented to this Court in the recent cases of *Whaler's Village Club* v. *California Coastal Com.* (1986) ____ U.S. ____ [106 S.Ct. 1962; 90 L.Ed.2d 648] (dismissed for want of jurisdiction), *Remmenga* v. *California Coastal Com. (1985) ____ U.S. ____ [106 S.Ct. 241, 88 L.Ed.2d 250] (dismissed for want of a substantial federal question) and Associated Home*

Builders of the Greater East Bay, Inc. v. *City of Walnut Creek et al.* (1971) 404 U.S. 878, (dismissed for want of a substantial federal question).

B. This appeal is improvidently brought because the decision of the California Court of Appeal did not involve the validity of a state statute. Rather, it involved the application of the California Coastal Act by appellee California Coastal Commission in a particular factual context. Moreover, appellants have not stated grounds for review by this Court under certiorari.

STATEMENT OF THE CASE

This appeal attacks the ability of the California Coastal Commission to regulate new coastal development. Specifically, it attacks the ability of the California Coastal Commission to protect publicly-owned tidelands and the people's right of access to those lands, guaranteed by the state constitution, from the cumulative adverse impacts of new coastal development. The public tidelands in California are threatened by the ever-increasing urbanization of the coastline. Buildout and the resultant intensification of private use adversely impacts the public's right to use its tidelands. At stake here is the ability of the California Coastal Commission to balance public rights in tidelands and access to those lands with the desires of coastal property owners to develop their property by requiring dedication of public access in exchange for permit approval to undertake such development. Traditional land use law has long recognized the power of government to condition its approval of development upon dedication requirements to lessen or avoid potential impacts on public resources. This case falls squarely under that long recognized power.

Under article X, section 4 of the California Constitution,[1] no

[1] "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof."

upland owner may interfere with the public's right of access to the sea. Further, the State Legislature is obligated to enact all laws necessary to make public access always attainable. Pursuant to this mandate and in light of the growing public awareness of the deleterious impacts of development and increased urbanization on the coast, the California Legislature enacted the Coastal Act of 1976.[2] One of the express goals of the Legislature's enactment is to maximize public access to and along the coast. (Pub. Resources Code, § 30001.5(c).) Section 30212 of the Coastal Act provides in pertinent part:

> "(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway."

It is within this context that the dedication condition at issue here was required.

The facts of this case are accurately set forth in the opinion of the California Court of Appeal, attached as Appendix A to appellants' Jurisdictional Statement.

Briefly, appellants Marilyn Harvey Nollan and James Patrick Nollan ("Nollans") own a lot on the beach in the Faria Beach Tract

[2] In 1972. the people of California adopted the Coastal Initiative which found and declared that the coastal zone is a distinct and valuable resource belonging to all the people, that it exists as a delicately balanced ecosystem and that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern to present and future residents of the state and nation. (*CEEED* v. *California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321.) The 1976 Act is the legislative continuation of that Coastal Initiative.

in Ventura County, California. (Juris. State., App. A, p. 2.) On March 1, 1982, the Nollans applied to appellee California Coastal Commission ("Commission") for a coastal development permit to demolish a one story, 521 square foot, one bedroom, substandard beach house on their lot and construct a two story, three bedroom, 1,674 square foot residence with attached two-car garage. (*Id.* at pp. 2-3.) They intend to live permanently in the new residence in contrast to the limited occasional vacation use by them and renters of the smaller structure. (*Id.* at p. 3.)

The Commission placed the Nollans' application on what is known as the administrative permit calendar and approved it on April 7, 1982, with a condition requiring lateral public access. The Nollans objected to that condition and requested a full public hearing. This request was denied. (*Ibid.*)

The Nollans then filed a petition for a writ of mandate. On January 18, 1983, after a hearing, the trial court ordered that a "writ of mandate shall issue from this court, remanding the proceedings to respondent and commanding respondent to set aside its decision of April 7, 1982 . . . and set the matter for a full evidentiary hearing." (*Ibid.*)

Upon remand a full public hearing was held before the Commission. At the conclusion of the hearing, the Commission approved the Nollans' permit application again with the condition requiring lateral public access. (*Ibid.*) The Commission found the proposed project would, with others like it, cumulatively adversely impact the public's right to traverse to and along the shoreline. (Juris. State, App. E, pp. 44, 45.)

The Nollans filed a supplemental petition for writ of mandate. The trial court issued a peremptory writ commanding the Commission to issue the permit without the condition requiring public access. The Commission appealed. (Juris. State, App. A, p. 3.)

The Court of Appeal reversed, holding:

"In *Grupe* v. *California Coastal Com.* (1985) 166

Cal.App.3d 148, 165, the court construed the leading California case on the constitutionality of exactions, *Associated Home Builders etc., Inc.* v. *City of Walnut Creek* (1971) 4 Cal.3d 633, to hold that only an indirect relationship between an exaction and a need to which the project contributes need exist. We agree with the *Grupe* reasoning.

". . .

"The court in *Grupe* held that the access condition was related to a need for public access to which Grupe's project contributed, even though standing alone it had not created the need for access. The court reasoned the project was one more brick in the wall separating the people of California from the state's tidelands. (*Id.* at p. 168.)

"The *Grupe* court also held that the exaction did not constitute a 'taking' because although it caused a diminution in the value of Grupe's property, it did not deprive him of the reasonable use of his property. (*Id.* at pp. 175-176.)

"As we pointed out in *Remmenga* v. *California Coastal Com.* (1985) 163 Cal.App.3d 623, 628, the justification for required dedication is not limited to the needs of or burdens created by the project. Here the Nollans' project has not created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access. The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission's decision." (*Id.* at pp. 5-6.)

I

THE ISSUES PRESENTED BY THIS APPEAL ARE SO BASIC TO LONG-ESTABLISHED LAW ON LAND USE REGULATION AS TO REQUIRE NO FURTHER ARGUMENT.

Appellants' attack in this case is on principles of constitutional law uniformly applied in California for more than 35 years with which this Court has concurred either by express holdings or through dismissal of prior appeals. This appeal presents issues so basic to long-established law on land use regulation that no further argument is required.

In *Associated Home Builders of the Greater East Bay, Inc.* v. *City of Walnut Creek et al., supra,* 404 U.S. 878, this Court concurred with a California Supreme Court decision upholding the constitutionality of dedication requirements as a condition to approval of new development. (*Associated Home Builders etc., Inc.* v. *City of Walnut Creek* (1971) 4 Cal.3d 633.) Contrary to the argument of appellants here, the validity of such dedication requirements is not dependent upon a factual showing that the development has created the need for it.

Similarly, this Court rejected an appeal, for lack of a substantial federal question, in a case challenging appellee Commission's ability to require fees in lieu of actual dedications for provision of public access. (*Remmenga* v. *California Coastal Com., supra,* 88 L.Ed.2d 250.) In that case, the California Court of Appeal had upheld imposition of fees, in lieu of provision of dedicated public access, against a constitutional challenge identical to that proferred by appellant here.

Most recently, this Court rejected an appeal, for want of jurisdiction, in a case challenging appellee Commission's ability to require actual dedication of public access. (*Whalers' Village Club* v. *California Coastal Com., supra,* 90 L.Ed.2d 648.) In that case, too, the California Court of Appeal upheld the access dedication condition against a constitutional challenge on "takings" grounds.

Appellants' argument that the Commission cannot require a dedication as a condition to approval of new development absent a showing of a direct relationship merits no further consideration by this Court.

A. The Opinion of the Court Below Is Consistent With This Court's Decisions Analyzing Whether Governmental Regulation Amounts to a Taking.

The Court of Appeal found that the Nollans' project, together with others like it, limit public access to the tidelands and beaches of the state and, therefore, collectively they create a need for public access. The court, relying on *Grupe* v. *California Coastal Com.* (1985) 166 Cal.App.3d 148, noted that the project was one more brick in the wall separating the people of California from the state's tidelands. (Juris. State., App. A, p. 6.) The court also relied on the *Grupe* court's reasoning that although the access condition caused a diminution in the value of the property, it did not deprive the owners of the reasonable use of the property therefore the condition did not constitute a taking. (*Ibid.*)

This analysis clearly comports with this Court's test for determining whether a taking has occurred. As this Court stated in *Agins* v. *Tiburon* (1980) 447 U.S. 255, 260:

> "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, see *Nectow* v. *Cambridge,* 277 U.S. 183, 188, (1928) [48 S.Ct. 447, 448, 72 L.Ed.2 842] or denies an owner economically viable use of his land, see *Penn Central Transp. Co.* v. *New York City,* 438 U.S. 104, 138, n. 36 (1978) . . ."

Moreover, this Court has recognized that a mere diminution in the value of property cannot amount to a taking. (*Penna. Coal Co.* v. *Mahon* (1922) 260 U.S. 393, 413; *Penn Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104, 131.) Thus, the analysis employed

by the court below in reviewing the validity of the access condition was consistent with this Court's pronouncements.

Appellants mistakenly rely on *Lorretto* v. *Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419 and *United States* v. *Security Industrial Bank* (1982) 459 U.S. 70. (Juris. State., pp. 4, 13-14.)[3]

Lorretto v. *Teleprompter Manhattan CATV Corp., supra,* involved a situation where the property owner took no action which could trigger the police power of the State of New York. New York enacted a statute permitting Teleprompter, a cable television company, to install television cables on apartment buildings without paying the owners of the buildings. This Court found this physical intrusion without any action of the property owner was improper unless payment was made. The case does not involve a permit situation like the present one where the property owner seeks governmental authorization to effect a change in his property and, in approving this change, the government attaches conditions to its approval.

Similarly, *United States* v. *Security Industrial Bank, supra,* 459 U.S. 70, involved a challenge to a bankruptcy statute which purported to retroactively abrogate liens on certain property acquired before the enactment of the provision. This Court expressly did not decide the constitutionality of retroactive application. (*Id.* at p. 74.) The Court noted, instead, that no bankruptcy law shall be construed to eliminate property rights which existed before the law was enacted in the absence of an explicit command from Congress. (*Id.* at p. 81.) Finding no such explicit command, the Court refused to allow retroactive application of the provision. Again, the case is not one involving the exercise of the police power in a regulatory context. The property owner, the lienholder, sought no governmental authorization to effect a change in his property, unlike the Nollans here.

[3] Appellants erroneously assert this is not a so-called "regulatory takings" case. (Juris. State., p. 13.) To the contrary, this undoubtedly is a regulatory case since the Commission, in approving the permit for the Nollans' development, was regulating the use of the property. The access dedication requirement is simply like any other dedication requirement imposed as a condition to development approval.

Appellants' reliance on both *Loretto* and *Security Industrial Bank* is inappropriate.

B. The Questions Presented in This Appeal Are Narrow and Factually Specific.

This case involved the application of the Coastal Act to a narrow, specific set of facts regarding the replacement of a substandard structure. This Court previously found no substantial federal question presented or no jurisdiction in appeals involving broader applications of the Coastal Act. In *Remmenga* v. *California Coastal Com., supra,* 88 L.Ed.2d 250, the question presented involved the imposition of fees in lieu of access dedications on new development projects on vacant land. In *Whaler's Village Club.* v. *California Coastal Com., supra,* 90 L.Ed.2d 648, an actual dedication requirement was upheld in connection with new construction to protect existing residential development. Here the dedication requirement was imposed on the replacement of a substandard beach cottage with a much larger full time residence, a very narrow and specific factual situation. Further review by this Court is unwarranted.

C. Appellants Mischaracterize the Opinion of the Court Below.

Appellants would have this Court believe the opinion of the court below required no relationship between the condition attached and the project proposed. (Juris. State., pp. 20, 23.) This is not true.

The court below recognized the necessity of a relationship between an exaction and a need to which the project contributes. (Juris. State., App. A, p. 5.) The court held that "the Nollans' project has not created the need for access to tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access." (*Id.* at p. 16.) The court below simply recognized that the cumulative impacts of many projects may collectively create a need which only one of the projects

individually might not create.[4] This is precisely the concept approved by this Court in *Associated Home Builders of the Greater East Bay Inc.* v. *City of Walnut Creek, supra,* 404 U.S. 878, (appeal dismissed for want of a substantial federal question). Appellants' arguments are so explicitly foreclosed by prior decisions of this Court as to warrant no further consideration.

II

APPEAL TO THIS COURT IS IMPROPER

Appellants invoke the jurisdiction of this Court based on 28 United States Code section 1257(2). That section allows an appeal when the validity of a state statute is drawn into question on the grounds it is repugnant to the United States Constitution. Here, however, it is the permit decision of the California Coastal Commission, based on the factual circumstances before it, which is challenged. (Juris. State., App. E.) The California Court of Appeal did not address the validity of a state statute; rather, it upheld the Commission's administrative decision against constitutional attack. (Juris. State., App. A.) Further, appellants did not seek review by the Supreme Court of California of the validity of a state statute. Review of the conditions attached to the Commission's permit decision only was sought. While appellants had challenged the constitutionality of various provisions of the California Coastal Act in their Supplemental Petition for Writ of Mandate, that challenge was not the basis for the decision of the state appellate court. Thus, the appeal should either be dismissed as improvidently brought or, if treated as a petition for review by writ of certiorari, review should be denied on the grounds set forth above.

---

[4] The Nollans claim they were entitled to a meaningful "takings" analysis (Juris. State., p. 22). They received one. The court below did not merely find that "their project fell within the parameters of an otherwise valid statute" (*ibid.*), the court clearly analyzed the relationship between their project and the condition as well as the condition's economic impact. The Nollans' argument to the contrary is specious.

CONCLUSION

The constitutional issues raised by appellants need no further review by this Court. The decision of the State Court of Appeal is entirely consistent with prior decisions of this Court and with accepted land use law as it has evolved over the past century. The Court of Appeal decision should be affirmed or, alternatively, the appeal should be dismissed.

DATED:_____

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General

JAMEE JORDAN PATTERSON
Deputy Attorney General

Attorneys for Appellee

JJP:lyc:ar
LA82CV0818
8/27/86

AFFIDAVIT OF SERVICE BY MAIL

Attorney:

JOHN K. VAN DE KAMP
Attorney General of
the State of California
N. GREGORY TAYLOR
Assistant Attorney General
JAMEE JORDAN PATTERSON
Deputy Attorney General

110 West A Street, Suite 700
San Diego, California 92101

No: 86-133
October Term, 1986

JAMES PATRICK NOLLAN AND MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

I, THE UNDERSIGNED, say: I am a citizen of the United States, 18 years of age or over, employed in the County of San Diego in which county the below stated mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS OR AFFIRM as follows: To Alexander L. Stevas, Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Timothy A. Bittle
John H. Lee
PACIFIC LEGAL
FOUNDATION
555 Capitol Mall, Suite 350
Sacramento, CA 95814

Ronald A. Zumbrun
Robert K. Best
PACIFIC LEGAL
FOUNDATION
555 Capitol Mall, Suite 350
Sacramento, CA 95814

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the _____ day of September 1986.

AFFIDAVIT OF SERVICE BY MAIL (continued)

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, September , 1986.

JAMEE JORDAN PATTERSON

Subscribed and sworn to before me
this _____ day of _____.

Notary Public in and for said County and State

REPLY

BRIEF

Supreme Court, U.S.
FILED
OCT 1 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

ARGUMENT

I. CALIFORNIA INTERPRETS FEDERAL "TAKING" LAW DIFFERENTLY THAN DOES THIS COURT 2

II. THE NOLLANS DID NOT RECEIVE A MEANINGFUL "TAKING" ANALYSIS, AND ARE ENTITLED TO ONE 4

III. THIS CASE PRESENTS QUESTIONS OF LAW WITH BROAD APPLICABILITY 8

IV. THIS CASE IS PROPERLY HERE ON APPEAL 10

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4

Edelman v. Jordan, 415 U.S. 651 (1974) 3

Hall v. City of Santa Barbara, 797 F.2d 1493 (9th Cir. 1986) 8

Illinois State Board of Elections v. Socialist Workers Party, 440 U.S. 173 (1979) 3

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 5, 7-8

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 4-7

MacDonald, Sommer & Frates v. Yolo County, 477 U.S. —, 91 L. Ed. 2d 285 (1986) 4

Massachusetts Board of Retirement v. Murgia, 427 U.S. 307 (1976) 3

Metromedia, Inc. v. City of San Diego, 453 U.S. 490 (1981) 3

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 5, 8

Washington v. Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 436 (1979) 3

STATUTES

Public Resources Code § 30212 ..... 5, 10

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the
State of California, Second Appellate District

APPELLANTS' BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

In a preamble to its motion, appellee California Coastal Commission unfairly portrays the nature of this case. This appeal does not "attack[] the ability of the California Coastal Commission to protect publicly-owned tidelands and the people's right of access to those lands." Motion of Appellee California Coastal Commission to Dismiss or Affirm (Motion) at 2. The commission is not protecting publicly-owned tidelands; it is merely attempting

to expand them. This appeal attacks the commission's ability to require dedication of privately-owned land for the purpose of adding to the state's inventory of publicly-owned land, without compensating the owners. Publicly-owned land is not threatened, or even involved, in this case. It is privately-owned land that needs this Court's protection.

—o—

ARGUMENT

I

CALIFORNIA INTERPRETS FEDERAL "TAKING" LAW DIFFERENTLY THAN DOES THIS COURT

The principle attacked in this appeal is the California rule that permit applicants may be required to surrender their private property to the state without compensation, even though their projects neither caused nor contribute to the public need in question.[1] The commission contends that this Court has "concurred" with the California rule "either by express holdings or through dismissal of prior appeals." The commission, however, does not cite any "express holdings," and the Nollans are unaware of any. As for the precedential value of summary dismissals of prior appeals, this Court has frequently stated in recent years that "summary actions do not have the same

[1] The commission's assertion that this rule has been "uniformly applied in California for more than 35 years" is not an accurate summary of California law. *See* Jurisdictional Statement at 15-16.

authority in this Court as do decisions rendered after plenary consideration." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 500 (1981); *Illinois State Board of Elections v. Socialist Workers Party,* 440 U.S. 173, 180-81 (1979); *Edelman v. Jordan,* 415 U.S. 651, 671 (1974). Accordingly, this Court has noted: "It is not at all unusual for the Court to find it appropriate to give full consideration to a question that has been the subject of previous summary action." *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation,* 439 U.S. 436, 476 n.20 (1979); *Massachusetts Board of Retirement v. Murgia,* 427 U.S. 307, 308 n.1 (1976).

The California rule is that confiscation of private property accomplished in the permit-issuing context is, by definition, a permissible exercise of the police power, not an exercise of the power of eminent domain; therefore, no "taking" analysis need be undertaken by the courts. The court's inquiry under the California rule is therefore limited to determining whether the exaction was statutorily authorized and served the public welfare (*i.e.,* whether it was within the police power). This is quite different from the federal rule, which recognizes the constitutional prohibition against government requiring some people alone to bear fully the burden of satisfying public needs they did not create.

The commission admits that the Nollans have correctly characterized the California rule when it states: "Contrary to the argument of appellants here, the validity of such dedication requirements is not dependent upon a factual showing that the development has created the need for it." Motion at 6. California in this way interprets

the protections of the Federal Constitution differently than this Court.

II

THE NOLLANS DID NOT RECEIVE A MEANINGFUL "TAKING" ANALYSIS, AND ARE ENTITLED TO ONE

The commission next argues that the Nollans got their "taking" analysis when the Court of Appeal gratuitously noted:

> "The *Grupe* court also held that the exaction [in *Grupe*] did not constitute a 'taking' because although it caused a diminution in the value of Grupe's property, it did not deprive him of the reasonable use of his property." Jurisdictional Statement, Appendix A at 6; Motion at 7.

Aside from the obvious fact that this was not an analysis of the Nollans' case, just a recitation of another case, it is also not the appropriate test for a case like the Nollans'.

The language taken from *Grupe* is the test this Court has employed to determine whether "*regulation* '[goes] too far.'" *MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. —, 91 L. Ed. 2d 285, 294 (1986) (emphasis added). This test is applied only when the "regulations do not require the landlord to suffer the physical occupation of a portion of his property by a third party." *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 440 (1982). The commission essentially concedes this by quoting in its motion the following language from *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980):

> "The application of a *general zoning* law to particular property effects a taking if the ordinance

> . . . denies an owner economically viable use of his land . . . ." Motion at 7 (emphasis added).

The statute being applied to the Nollans, California Public Resources Code § 30212, is not a "general zoning" law. The statute is not a regulatory law at all; that is, it does not restrict what *use* the Nollans may make of their property. Rather, the statute mandates an uncompensated *conveyance* of their property to the state, and the opening up of that property to physical public use. As this Court stated in *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 124 (1978):

> "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion . . . than when interference arises from [regulation]."

The same point was made in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979):

> "This is not a case in which the Government is exercising its regulatory power in a manner that will cause an insubstantial devaluation of petitioners' private property; rather, the imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina. . . . And even if the Government physically invades only an easement in property, it must nonetheless pay compensation." *Id.* at 180.

The commission has avoided the Nollans' primary assertion that this is a physical invasion case based on *Kaiser Aetna* and *Loretto v. Teleprompter Manhattan CATV Corporation.* It devotes one brief paragraph to *Loretto* on Page No. 8 of its motion, in which it merely states that *Loretto* did not involve a permit application. The implication of this argument is that the constitutional

violation found present in *Loretto* could have been avoided had the city simply made the physical invasion of Mrs. Loretto's property a condition of a permit. The commission would thus have this Court distinguish the invasion here from the invasion found unlawful in *Loretto* on the grounds that Mrs. Loretto "took no action which could trigger the police power of the State." Motion at 8. This distinction was raised and rejected, however, in the *Loretto* opinion itself. The cable companies had argued that New York's cable attachment law applied only to rental property—a regulated industry in New York—and that the privilege sought by landlords, of engaging in the rental business, could be conditioned by requirements such as cable access that served the public welfare. This Court responded:

> "Teleprompter notes that the law applies only to buildings used as rental property, and draws the conclusion that the law is simply a permissible regulation of the use of real property. We fail to see, however, why a physical occupation of one type of property but not another type is any less a physical occupation. . . .
>
> " . . . [A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical occupation of his land cannot be so easily manipulated." *Loretto*, 458 U.S. at 438-39 and n.17.

Almost every aspect of human life could require a permit if the state chose to regulate it. States should not be allowed to acquire private property without compensation through the simple device of setting up a permitting scheme, then lying in wait for the owner to "trigger the police power."

The commission also tries to trivialize the effect of its dedication requirement by referring to it as a "mere diminution in the value of property." Motion at 7. The Nollans are suffering an intrusion on protected private property that is much greater than the cable access requirement declared unconstitutional in *Loretto* or the public access requirement declared unconstitutional in *Kaiser Aetna*. The cables and boxes in *Loretto* quietly occupied only a few square feet on the outside of Mrs. Loretto's apartment building. She still held the full fee title to the underlying building. Here, the public will occupy more than a third of the Nollans' entire lot. Because public use will occur day in and day out, in perpetuity, the occupation is permanent, even though the identity of individual beach users will change as people come and leave. Unlike Mrs. Loretto's inanimate cables and boxes, the public can be expected to litter, make noise, and probably vandalize the Nollans' property. Moreover, the Nollans will have to insure themselves for public liability. Finally, the state here is doing much more than just authorizing third parties to occupy an area, the title to which is still held in fee by the owners. In addition to authorizing occupation of the Nollans' property, the state is making itself a *co-owner* of their property. *Cf. Kaiser Aetna*, 444 U.S. at 166 (government wanted public access, but not co-ownership). The permit condition under review requires the Nollans to convey an easement over the seaward third of their lot to the State of California. Co-ownership of a private beachfront lot in Southern California is a very valuable property interest indeed. This sort of invasion of rights cannot be countenanced just because the owner is left with

other rights that were not affected. The Nollans are entitled to a meaningful "taking" analysis and to just compensation.[2]

III

THIS CASE PRESENTS QUESTIONS OF LAW WITH BROAD APPLICABILITY

The commission's next contention, that this appeal raises only narrow and factually specific questions, is curious. According to this Court, "taking" cases are by nature "essentially ad hoc, factual inquiries" and therefore must always be presented to the Court with reference to their specific facts. *Penn Central,* 438 U.S. at 124; *Kaiser Aetna,* 444 U.S. at 175. This case is much less factually specific than most. The Nollans are not complaining that the California courts drew the wrong conclusion after a proper "taking" analysis (a factual question of degrees). Rather the Nollans are complaining that the California courts never gave them a proper "taking" analysis, when they were entitled to one (a pure question of law). *See* "Questions Presented," Jurisdictional Statement at i.

The Nollans' complaint is that the California courts apply a police power test instead of a "taking" analysis. If the exaction is authorized by a statute and good for the public, the inquiry ends. Whether the owners' rights were violated is not considered.

---

[2] It is the Nollans' position that the physical invasion authorized in this case is a per se taking under *Loretto, et al.* At a minimum, however, such a physical occupation of one-third of their land cannot be constitutionally permissible without a finding that their project directly contributed to the public need in question. *See Hall v. City of Santa Barbara,* 797 F.2d 1493 (9th Cir. 1986) (taking analysis differs when physical occupation involved).

The relevant relationship in a meaningful "taking" analysis is not the relationship between the exaction and the public need, but rather the relationship between the exaction and the owners' proposed use. Here the owners' proposed use was the mere replacement of an existing house. As acknowledged by the lower court, and the commission in its motion: "Here the Nollans' project has not created the need for access to the tidelands fronting their property." Jurisdictional Statement, Appendix A at 6; Motion at 9. Despite this, throughout the commission's motion, and the lower court's opinion, the conclusory statement is made that the Nollans' project is "one more brick in the wall separating the people of California from the state's tidelands." Jurisdictional Statement, Appendix A at 6, Motion at 5, 7.

To say that the Nollans' project is "one more brick in the wall" is very poetic. But poetry is not a substitute for factual analysis. How is the Nollans' project one more brick in the wall? It does not interfere with access. The public has never had legal access across any part of the Nollans' lot. The Nollans' lot has been privately owned since before California became a state. If any part of the Nollans' lot was ever used by the public for access to state-owned tidelands, it was by trespassing. The Nollans' replacement house does not encroach on public property; it is situated entirely on private property, and conforms to all setback and height limitations. Any legal access to state-owned tidelands that formerly existed still exists. The Nollans' project is not one more brick in the wall separating the people of California from their tidelands. Rather, the published decision of the California Court of Appeal in this case is one more brick in the wall separating California property owners from their constitutional rights.

IV

THIS CASE IS PROPERLY HERE ON APPEAL

California Public Resources Code § 30212 requires an uncompensated dedication of land for "access" whenever something within the all-inclusive definition of "development" occurs between the last public road and the sea. The Court of Appeal acknowledged that the commission was therefore "required by the provisions of Public Resources Code section 30212" to demand a dedication of access from the Nollans. Thus, the validity of Section 30212, as applied to the Nollans, is properly before this Court on appeal.

DATED: October, 1986.

Respectfully submitted,

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

MOTION

Supreme Court, U.S.
FILED
NOV 26 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-133

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the
State of California, Second Appellate District

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS

JOHN K. VAN DE KAMP
Attorney General
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
N. GREGORY TAYLOR,
Assistant Attorney General
JAMEE JORDAN PATTERSON
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-6050

Attorneys for Appellee

QUESTIONS PRESENTED

The questions presented by this motion to dismiss are whether:

(a) Appellants James Patrick Nollan and Marilyn Harvey Nollan lack standing to appeal to this Court under 28 United States Code section 1257 (2) where the federal question posed in their appeal was neither presented nor decided in the courts below; and

(b) Appellants James Patrick Nollan and Marilyn Harvey Nollan have waived their right to challenge the decision of appellee California Coastal Commission under California law.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
STATEMENT OF THE CASE	2
STATEMENT OF FACTS	3
ARGUMENT	6
I THE COURT LACKS JURISDICTION TO HEAR THIS CASE. APPELLANTS FAILED TO PROPERLY RAISE THE QUESTION OF COMPENSATION FOR THE VALID EXERCISE OF THE POLICE POWER IN THE STATE COURTS BELOW; CONSEQUENTLY, IT CANNOT BE RAISED IN THIS COURT FOR THE FIRST TIME.	6
II APPELLANTS HAVE WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW BY CONSTRUCTING THE DEVELOPMENT PRIOR TO FINAL ADJUDICATION OF THIS MATTER.	8
CONCLUSION	12

TABLE OF CITATIONS

CASES

	Page
Cardinale v. Louisiana (1969) 394 U.S. 437 [22 L.Ed.2d 398, 89 S.Ct. 1161]	7
County of Imperial v. McDougal (1977) 19 Cal.3d 505 [138 Cal.Rptr. 472, 564 P.2d 14] [434 U.S. 944, 54 L.Ed.2d 306, 98 S.Ct. 469]	9,10
J-Marion Co. v. County of Sacramento (1977) 76 Cal.App.3d 517 [142 Cal.Rptr. 723]	10
Lynch v. New York (1934) 293 U.S. 52 [79 L.Ed 191, 55 S.Ct. 16]	7
Pfeiffer v. City of La Mesa (1977) 69 Cal.App.3d 74 [137 Cal.Rptr. 804]	10,11
Simon v. Eastern Ky. Welfare Rights Org. (1976) 426 U.S. 26 [48 L.Ed.2d 450, 96 S.Ct. 1917]	11
Whaler's Village Club v. California Coastal Com. (1985) 173 Cal.App.3d 240, [____ Cal.Rptr. ____] dismissed for want of jurisdiction ____ U.S. ____ [106 S.Ct. 1962; 90 L.Ed.2d 648]	9

TABLE OF CITATIONS (cont.)

	Page
CODES	
28 U.S.C., § 1257 (2)	2
Cal. Code Civ. Proc., §§ 425.10	7
580	7
1094.5	10
Cal. Gov. Code, § 65913.5	11
Cal. Pub. Resources Code, §§ 30212	2
30600	9
CONSTITUTION	
United States Constitution, Fifth Amendment	2

TABLE OF CONTENTS

	Page
COURT RULES	
Rules of the Supreme Court of the United States Rule 16.1(a), (b) and (d)	1
MISCELLANEOUS	
Stern, Gressman and Shapiro, *Supreme Court Practice* (6th Ed. 1986) p. 647	2,8,9

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

NO. 86-133

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the
State of California, Second Appellate District

MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS

Appellee California Coastal Commission, pursuant to Rule 16.1(a), (b) and (d) of the Rules of the Supreme Court of the United States, moves the Court to dismiss this appeal on the

grounds that this Court is without jurisdiction because the federal question posed was not presented or decided by the courts below and because, under state law, the appellants have waived their ability to challenge appellee California Coastal Commission's decision.[1]

STATEMENT OF THE CASE

Appellants James Patrick Nollan and Marilyn Harvey Nollan ("Nollans") invoke the jurisdiction of this Court under 28 United State Code section 1257(2). (Juris. State., pp. 2-3.) The Nollans claim the decision of appelle California Coastal Commission ("Commission"), made pursuant to California Public Resources Code section 30212, is contrary to the Fifth Amendment of the United States Constitution. Specifically, the Nollans assert that their Fifth Amendment rights were violated because the state courts failed to analyze whether a valid exercise of the police power nevertheless may warrant compensation. (Juris. State., p. i.) Appellants assert they raised the issue of entitlement to compensation in the courts below. (Juris. State., p. 4.) They did not.

In the courts below, the Nollans in their Supplemental Petition for Writ of Mandate sought only to invalidate the action of appellee Commission. While offhand references to compensation were made throughout their briefs, no compensation was sought in these proceedings in the courts below. Thus the question presented to this Court was never presented to or decided by the courts below. Moreover, the Nollans have constructed the development

[1] Appellee previously filed a motion to dismiss the appeal herein or, alternatively, to affirm the judgment of the state appellate court below upon different grounds, specifically the lack of a substantial federal question. Authority for the filing of this motion is found in Stern, Gressman and Shapiro, *Supreme Court Practice* (6th Ed. 1986) p. 647:

> "But after... the Court has ruled upon the jurisdictional statement in an appeal, a motion to dismiss may be received if not based upon grounds already advanced...."

which was the subject of the challenged decision by appellee. This fact was first disclosed to the courts in the Nollans' Jurisdictional Statement. (Juris. State., p. 5, fn. 1.) Under California law, such construction results in a waiver of the right to challenge any conditions imposed on approval of the development.

STATEMENT OF FACTS

The Nollans' property which is the subject of this litigation is located in the Faria Beach Tract of Ventura County, California.

This case concerns a deed restriction imposed as a condition of a permit for the demolition of the Nollans' beach cottage and construction of the Nollans' new beachfront house. The deed restriction required the Nollans to acknowledge the public's right to use a narrow beach for lateral access seaward of an existing seawall. All the development proposed by the Nollans would be behind or landward of the seawall. The seawall is located very near the mean high tide line. (Juris. State., App. E, p. 41.) The public owns the tidelands below the mean high water line. At times the seawall appears to be about 10 feet from the high water line (*ibid.*), and other times, the water extends up to the Nollans' seawall, as well as the seawalls of neighboring residents, preventing pedestrian passage when the tide is in. (*Id.* at p. 47.)

The public had been given permission to use the beach along the Faria Tract for lateral access in the past. (*Id.* at p. 28.) The public has also made use of the beach at Faria for recreational purposes, including surfing, beach hiking and bathing. (*Id.* at p. 49.) While the public has made substantial use of the Faria beach area in the past, including the seaward strip of the Nollan property, no assurance existed that such use would be allowed to continue. (*Id.* at p. 50.)

Appellants leased their lot in the Faria Beach Tract. (*Id.* at p. 27.) On March 1, 1982, the Nollans applied to appellee Commission for a coastal development permit to demolish a one story, 521 square foot, one bedroom, substandard beach house on their lot and construct a two story, three bedroom, 1,674 square foot residence with attached two-car garage. (*Id.* at pp. 2-3.) While the beach house had been used in the past as a summer home and vacation rental, it had not been used at all since March 1982. (Juris. State., p. 5.) The Nollans intend to live permanently in the new residence in contrast to the limited occasional vacation use by them and renters of the smaller structure. (Juris. State., App. E, p. 39.)

The Faria Beach Tract was originally comprised of small beach cottages, such as the Nollans', which were used mainly as vacation homes. (*Id.* at p. 40.) As in many other coastal communities, these small secondary homes are being torn down and replaced with much bigger primary residences. (*Ibid.*) The Commission has approved many permits for such demolition and new construction in the Faria Tract, including one on each side of the Nollan property. (*Id.* at p. 38.) The Nollans' new residence would be three times larger and one story higher than the old beach house and would greatly increase the lot coverage to 2,464 square feet. (*Id.* at p. 36.) The Nollans' lot is only 2,800 square feet. (*Ibid.*)

The Commission placed the Nollans' application on what is known as the administrative permit calendar and approved it on April 7, 1982, with a condition requiring lateral public access. The Nollans objected to that condition and requested a full public hearing. This request was denied. (*Ibid.*)

The Nollans then filed a petition for a writ of mandate. On January 18, 1983, after a hearing, the trial court ordered that a " 'writ of mandate shall issue from this court, remanding the proceedings to respondent and commanding respondent to set aside its decision of April 7, 1982 ... and set the matter for a full evidentiary hearing.' " (*Ibid.*)

Upon remand a full public hearing was held before the Commission. At the conclusion of the hearing, the Commission approved the Nollans' permit application again with the condition requiring lateral public access. (*Ibid.*) The Commission found the proposed project would, with others like it, cumulatively adversely impact the public's right to traverse to and along the shoreline. (Juris. State., App. E, pp. 42, 45.)

The Nollans filed a supplemental petition for writ of mandamus. (Supplemental Petition for Writ of Mandamus, attached here as Appendix 1.) In their petition the Nollans sought only that the access condition be invalidated and that the permit be issued without the condition. (App. 1, p. 21.) The Nollans did not ask for compensation in the event the access condition was found to be valid. (*Ibid.*).

The trial court issued a peremptory writ commanding the Commission to issue the permit without the condition requiring public access. The Commission appealed. (Juris. State., App. A, p. 3.) The Nollans purchased their previously leased lot following the trial court decision. (Juris. State., p. 5, fn. 1.)

The Court of Appeal reversed, holding the access condition was valid. (Juris. State., App. A, p. 5.) The Nollans did not raise and the Court of Appeal did not address whether compensation was nevertheless owed because the access condition permitted the public to use a portion of the Nollans' property.

The Nollans sought review by the California Supreme Court. Review was denied. (Juris. State., App. B, p. 10.) The Nollans then filed the present appeal where they disclosed for the first time that they had constructed the house upon prevailing in the trial court. (Juris. State., p. 5, fn. 1.) The Nollans did not seek any monetary relief and the courts below did not deny, award or rule on the question of their entitlement to it.

ARGUMENT

I

THE COURT LACKS JURISDICTION TO HEAR THIS CASE. APPELLANTS FAILED TO PROPERLY RAISE THE QUESTION OF COMPENSATION FOR THE VALID EXERCISE OF THE POLICE POWER IN THE STATE COURTS BELOW; CONSEQUENTLY, IT CANNOT BE RAISED IN THIS COURT FOR THE FIRST TIME.

The first question presented in the Nollans' jurisdictional statement posits:

> "Having determined that a permit condition which exacts a dedication of access across real property to allow a physical invasion for public use is a valid exercise of the police power, must the state courts then evaluate whether compensation under the Fifth Amendment is nonetheless owing?" (Juris. State., p. i.)

The Nollans assert that despite the validity of the access condition imposed, they were entitled to just compensation. (*Id.* at p. 22.) However, the Nollans never sought compensation in the courts below; rather, they sought only to invalidate the access condition. In the prayer for relief in the California Superior Court, the Nollans asked that:

> "1. a peremptory writ of mandate be issued directing respondent to delete the special access conditions from its approval of petitioners' permit and approve said permit without such conditions;

> "2. a peremptory writ of mandate be granted by this court requiring and compelling respondent to:
>
> "....
>
> "c. a perform its statutory and constitutional duties in accordance with the Coastal Act of 1976, applicable state law, and the State and Federal Constitutions; ..." (App. 1, p. 21.)
>
> "....
>
> "5. other and further relief as the Court deems just and proper be awarded to petitioners." (App. 1, pp. 21-22.)[2]

Throughout the proceedings in the courts below, the Nollans sought to invalidate the access condition. Nowhere did they explicitly seek compensation or monetary damages for the alleged "taking" of their property. They only sought to free themselves of the access condition and to avoid public use of the sandy beach. For that reason, the issue is not properly before this Court.

For this Court to have jurisdiction, the federal question must have been both raised and decided in the state court below. (*Cardinale v. Louisiana* (1969) 394 U.S. 437, 438 [22 L.Ed.2d 398, 89 S.Ct. 1161].) It must appear from the record that the decision of the federal question was necessary to the determination of the cause and actually decided. (*Lynch v. New York* (1934) 293 U.S.

---

[2] Such a prayer for other relief does not constitute a claim for monetary relief. In California, such a claim must state the amount prayed for (except for personal injury and wrongful death). (Cal. Civ. Proc., § 425.10.) Relief can only be awarded consistent with the case made by the complaint and embraced within the issue. (§ 580.) Nowhere in their supplemental petition did the Nollans seek compensatory relief.

52, 54 [79 L.Ed 191, 193, 55 S.Ct. 16].) Jurisdiction cannot be founded on surmise nor be sustained by references in briefs. (*Ibid.*)

Raising the federal question for the first time before this Court cannot confer jurisdiction.

> "It is too late, of course, to raise the federal question for the first time in the notice of appeal to the Supreme Court or in the jurisdictional statement. Such papers are not part of the record of the state court proceedings and it is that record which must affirmatively show a raising of the federal issue." (Stern, Gressman and Shapiro, *supra*, p. 157.)

Appellants failed to properly raise in the state courts below the federal question of whether compensation under the Fifth Amendment to the United States Constitution is due for valid regulatory actions allowing public use of private property. Raising the question for the first time before this Court cannot confer jurisdiction. Therefore, the issue is not properly before the Court and jurisdiction will not lie. The appeal should be dismissed.

II

APPELLANTS HAVE WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW BY CONSTRUCTING THE DEVELOPMENT PRIOR TO FINAL ADJUDICATION OF THIS MATTER.

Following this Court's noting of probable jurisdiction, the Commission undertook to determine the exact factual setting

regarding the Nollans' construction of the house during the pendancy of this case. It will be recalled that appellants for the first time disclosed in a footnote in their Jurisdictional Statement that:

> "After winning this case in the trial court, the Nollans..., constructed the new residence." (Juris. State., p. 5.)[3]

The Nollans have never requested or received their coastal development permit or provided the deed restriction. If fact the permit remains in the Commission's file in its Santa Barbara office.[4] By demolishing the old house and erecting the new structure, the Nollans essentially obtained all they would have been entitled to had they accepted the permit. However, by constructing without the permit having issued, they have evaded the conditions imposed.

Under state law, a landowner who objects to a condition of permit approval has two options. The landowner can accept the permit and undertake the authorized development. In so doing, the landowner receives the benefits of the permit and is therefore bound by any conditions attached. Such an acceptance precludes a subsequent challenge to the permit conditions. (*County of Imperial v. McDougal* (1977) 19 Cal.3d 505, 510-511, [138 Cal.Rptr. 472, 564 P.2d 14] appeal dismissed 434 U.S. 944 [54 L.Ed.2d 306, 98 S.Ct. 469].) A landowner who objects to the conditions has the

---

[3] The construction occurred without any coastal development permit having been issued, in violation of the California Coastal Act of 1976. (Cal. Pub. Resources Code, § 30600; *Whaler's Village Club v. California Coastal Com.* (1985) 173 Cal.App.3d 240, [____ Cal.Rptr. ____] dismissed for want of jurisdiction ____ U.S. ____ [106 S.Ct. 1962; 90 L.Ed.2d 648] (injunctive relief, civil fines and penalties available for violation of Coastal Act).) A violation action would be separate matter which the Commission would have to bring. This has not yet been addressed by the Commission.

[4] The Commission will provide further proof of these facts should this Court deem it necessary. (See, Stern, Gressman and Shapiro, *supra*, pp. 564-565.)

right to judically challenge them. (*Ibid.*; accord, *J-Marion Co. v. County of Sacramento* (1977) 76 Cal.App.3d 517, 523 [142 Cal.Rptr. 723].) The challenge must be brought before the permit is accepted. It is fundamental that a landowner who accepts a permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying. (*Pfeiffer v. City of La Mesa* (1977) 69 Cal.App.3d 74, 78 [137 Cal.Rptr. 804].) This principle is applicable where a landowner unilaterally announces he is proceeding under protest and reserving the right to seek compensation later. (*Ibid.*) In *Pfeiffer*, the landowners obtained approval of a building permit subject to conditions requiring the granting of an easement and construction of a storm drain across the property. (*Id.* at p. 76.) They elected to comply with the conditions under protest, asserting they were not waiving their rights to compensaton. (*Ibid.*) The Court of Appeal held this could not be done. Their proper remedy was to seek invalidation of the conditions pursuant to California Code of Civil Procedure section 1094.5. As the court explained:

> "If every owner who disagrees with the conditions of a permit could unilaterally decide to comply with them under protest, do the work, and file an action in inverse condemnation on the theory of economic coercion, complete chaos would result in the administration of this important aspect of municipal affairs." (*Pfeiffer v. City of La Mesa, supra,* 69 Cal.App.3d at p. 78.)

The Nollans did admittedly challenge the access condition in the proper manner. However, they refused to await the final outcome of the judicial proceedings. Before the Commission was able to exercise its right to appeal the adverse trial court decision, the Nollans unilaterally, without the knowledge or acquiescence of the Commission, proceeded to construct the residence without any permit and in violation of the California Coastal Act. If, as in

Pfeiffer, a property owner who complies with the law and his permit is barred from challenging the permit's conditions, clearly one who violates the law is precluded from such a challenge.

Property owners who challenge the validity of permit conditions must await the final outcome of the judicial proceedings before undertaking the permitted development. Absent the agreement or acquiescence of the governmental entity, a unilateral decision by the property owner to proceed with the development waives the ability to challenge the conditions of development approval. (*Pfeiffer v. City of La Mesa, supra,* 69 Cal.App.3d at p. 76.)[5] Under state law, appellants have waived their challenge to the access condition and have, therefore, no right to appeal to this Court. An actual case or controversy is an essential prerequisite to this Court's jurisdiction. (*Simon v. Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 37 [48 L.Ed.2d 450, 96 S.Ct. 1917].) A plaintiff must show some injury to himself that is likely to be redressed by a favorable decision. (*Id.* at p. 38.) Since the Nollans are precluded by state law from challenging the access condition, no case or controversy remains for this Court's resolution. The Nollans' appeal should be dismissed.

---

[5] In 1984 California enacted legislation which, under prescribed and limited circumstances, allows a property owner to comply under protest and later challenge any exaction attached to permit approval. (Cal. Gov. Code, § 65913.5.) It has no application here.

CONCLUSION

For the foregoing reasons, the appeal by James Patrick Nollan and Marilyn Harvey Nollan should be dismissed for lack of jurisdiction, and the judgment below be allowed to stand.

DATED: _____.

Respectfully submitted,

JOHN K. VAN DE KAMP
Attorney General
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
N. GREGORY TAYLOR
Assistant Attorney General

_____

JAMEE JORDAN PATTERSON
Deputy Attorney General

Attorneys for Appellee

APPENDIX

RONALD A. ZUMBRUN
HAROLD J. HUGHES
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Petitioners

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF VENTURA

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN, Petitioners, v. CALIFORNIA COASTAL COMMISSION, Respondent.	Civ. No. SP 50805 SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS *(CCP § 1094.5)*

Petitioners, James Patrick Nollan and Marilyn Harvey Nollan (the Nollans), petition this Court for a further writ of mandate under Code of Civil Procedure § 1094.5, directed to respondent, California Coastal Commission, and by this verified petition represent that:

1. Petitioners, James Patrick Nollan and Marilyn Harvey Nollan, are the lessees of a small piece of property along the Pacific Coast Highway in Ventura County, California. Near the

property are both Faria County Park, with a public beach and recreational facilities, and the "Cove," a privately-owned beach on which public access is allowed.

2. The Nollans applied to the California Coastal Commission (Commission) for a permit to demolish a substandard beach house and replace it with a three-bedroom residence for their family. The proposed home will accommodate fewer people than the existing house. The public has never had a right to use the beach above the mean high tide line and the view will not be affected by the replacement housing. Nevertheless, the Commission, quoting from its Statewide Interpretive (Shoreline) Guidelines for Public Access (Public Access Guidelines) found that replacement of the substandard house would "burden" public access to the beach by "discouraging the public from visiting the shoreline because of [the home's] physical proximity," and based upon unsupported speculation that it would congest the access roads and recreation areas, consume off-street parking, and increase the use of the beach by residents and guests.

3. According to the Commission, a single-family home would become consistent with the Coastal Act of 1976 (Coastal Act) if the Nollans would agree to dedicate their entire beach area, which comprises nearly a third of the property, to public use.

4. On January 18, 1983, after hearing, this Honorable Court ordered a preemptory writ of mandamus to issue requiring the Commission to hold a public hearing and "make proper evidentiary findings." The Court stated that a "valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access" and concluded that "[n]o such burden is shown by the facts in the administrative record."

5. On remand, after changing hearing dates twice, and continuing the hearing for a month, the Commission, relying on its Public Access Guidelines and generalized findings, again required the Nollans to agree to dedicate their entire beach area, comprising nearly one-third of the property, to public use to obtain a permit.

6. In order to expedite demolition and construction pending further Court review, petitioners offered to make the required dedication under protest. The Commission would not accept dedication under protest and instead required petitioners to submit an offer "that does not contemplate a legal challenge to the Commission's action on the permit."

7. Because abundant public access to the beach already exists nearby, and because the Nollan home would have no effect on public access, the access condition is not authorized by the Coastal Act. The Nollans seek Court relief in order to build their home without first dedicating their beach to public use.

8. Petitioners also challenge the validity of the Commission's Public Access Guidelines, attached hereto as Exhibit A, as being violative of the Coastal Act, Public Resources Code §§ 30000, *et seq.*, violative of the duties imposed upon the Commission, and in excess of its jurisdiction. The Commission's stubborn insistence on the dedication demanded of petitioners was unavoidable under the guidelines.

9. Petitioners seek a writ of mandate to compel respondent to carry out its duties to promulgate guidelines in accordance with the provisions of the Coastal Act (Public Resources Code § 30620(a)(3), article I, section 19 of the California Constitution, and the Fifth and Fourteenth Amendments to the United State Constitution.

THE FORCED DEDICATION OF ACCESS

10. Petitioners, Nollans, are now, and at all times relevant herein have been, lessees of a developed parcel of real property commonly known by street address as 3822 Pacific Coast Highway, Ventura, Ventura County, California (the property). The property is specifically described in Exhibit B attached hereto and incorporated herein by this reference.

11. Petitioner, Nollans, are now, and at all times relevant herein have been, in the process of purchasing the property from the Faria Beach Trust. The trustees of the Faria Beach Trust are currently holding title to the property subject to its transfer to the Nollans.

12. Respondent, Commission, is now, and at all times relevant herein has been, the agency charged with administering provisions of the Coastal Act. Respondent is charged by law with the duty to adopt only such guidelines as are not in conflict with the provisions of the Coastal Act, nor enlarge the powers of the commission in violation thereof. Public Resources Code § 30620(a)(3). Petitioners have a clear, present, and beneficial right to the performance of said duties.

13. During December, 1981, and January, 1982, the Nollans and trustees of the Faria Beach Trust executed a series of documents providing that, upon the fulfillment of various conditions by the Nollans, title to the property would be transferred from the trustee to the Nollans.

14. Among the conditions referred to in Paragraph No. 13 herein was the requirement that the Nollans either agree to bring the structure then existing on the property into conformity with all existing and applicable building, health, and safety code requirements or agree to demolish the existing structure and agree to replace it with one meeting all existing and applicable building, health, and safety code requirements.

15. In order to meet the specific condition described in Paragraph No. 14 herein, and because it was not possible to bring the existing structure up to code, the Nollans determined to demolish the existing structure and replace it with one meeting existing and applicable building, health, and safety code requirements.

16. On or about February 22, 1982, the Nollans and trustees of the Faria Beach Trust filed an Application for Coastal Development Permit with respondent for a permit to construct a single-family dwelling with attached garage on the property.

17. Petitioners were informed that their application had been placed on the administrative calendar for the April 7, 1982, Commission public hearing in Eureka, California, and were mailed a copy of a "Project Information" compilation presumably prepared by respondent's staff. A copy of said Project Information appears in the Administrative Record (AR) previously filed herein at Page Nos. 37-40 and is incorporated herein by this reference.

18. Petitioners were unable to attend the April 7, 1982, Commission meeting because of the burdens involved in traveling to Eureka from their residence in Los Angeles County, a distance of some 630 miles.

19. Petitioners were given the option of attending a South Central Coast District pre-commission meeting workshop in Santa Barbara, California, on April 1, 1982. Petitioners were told that a member of respondent's staff would receive comments regarding various applications from persons who were unable to attend the Commission hearing in Eureka, and would then relay said comments to the Commission at respondent's meeting of April 7-8, 1982, in Eureka, California.

20. Because petitioners would be unable to attend the April 7, 1982, Commission hearing in Eureka, petitioner, James Nollan, appeared at the South Central Coast District pre-commission meeting workshop on April 1, 1982, and presented written and oral objections to the imposition of the lateral access conditions recommended on Page No. 2 of the Project Information, AR at 38. A copy of the written objections appears at AR 57-80 and is incorporated herein by this reference.

21. On or about April 7, 1982, a public hearing was held in Eureka, California, before respondent concerning petitioners' application.

22. Petitioner James Nollan's entire April 1, 1982, presentation was orally summarized at the Commission hearing in Eureka as follows:

> "The applicants contend that based on the Pacific Legal Foundation Court of Appeals decision that the Commission should no longer be requiring public access in these types of situations." AR at 89.

23. On or about April 7, 1982, respondent decided to grant petitioners' permit, subject to certain conditions.

24. On or about April 14, 1982, petitioners were informed of respondent's decision to approve their permit with conditions. A copy of the Notice of Intent to Issue Permit appears at AR 47-50 and is incorporated herein by this reference.

25. Among the conditions imposed by respondent's decision, special condition No. 1 (the access condition) required that petitioners, without compensation

> "shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area

> bounded by the mean high tide line at one end, to the toe of the revetment at the other end. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution."

26. The area to be dedicated to public use in accordance with special condition No. 1 constitutes approximately 30% of petitioners' property.

27. On June 3, 1982, petitioners initiated the instant action by filing a Petition for Administrative Mandamus.

28. On January 18, 1983, this Honorable Court issued a Judgment Granting Peremptory Writ of Mandamus and a Statement of Decision directing respondent to hold a public hearing and to "make proper evidentiary findings, and take action on Permit No. 4-82-90 in accordance with this decision."

29. In its initial return to the Court's peremptory writ of mandamus the Commission scheduled a hearing on petitioners' application for March 21, 1983. Subsequently, the hearing was rescheduled to April 26, 1983, more than 49 days after notification of the Commission's decision to hold a public hearing. Pub. Res. Code § 30621.

30. The Commission opened a hearing on petitioners' application on April 28, 1983, in San Diego. Neither the Commission nor any member of the public presented any new evidence which had not been part of the earlier record. Although 18 substantive file documents were listed on the staff report, a copy of this Court's Statement of Decision had not been made a part of the Commission record until supplied by petitioners. Over the objection of petitioners, the Commission followed a staff recommendation that the hearing be continued. A copy of the staff report is attached hereto as Exhibit C and is incorporated herein by this reference.

31. The Commission hearing continued on May 26, 1983, in Santa Barbara. In response to this Court's statement that "[a] valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access," the staff report identified only generalized or speculative "findings and declarations," including: (1) unsubstantiated speculation regarding potential public ownership of some undefined portion of the petitioners' property; (2) hearsay regarding access conditions and the shoreline in other parts of the nation and state (including Lake Tahoe, Santa Monica, and San Diego); (3) unsupported suggestions that replacement housing "would present an psychological barier to the public;" (4) speculation that "the public may get the impression that the beach front is no longer available for public use;" (5) an entirely unsupported assumption that further reconstruction of houses will require construction of "[f]acilities such as stores, gas stations, and restaurants;" (6) an irrelevant discussion of the importance of vertical access; and (7) the incorporation of a letter and two pictures relating to a different area of the coast, which had been submitted four years earlier in connection with an entirely separate application. A copy of this Staff Report and Recommendation is attached hereto as Exhibit D and is incorporated herein by this reference.

32. Within two hours of the continued Commission hearing on May 26, 1983, the Commission provided mimeographed form declarations from 18 surfers who claimed to have trespassed in the general vicinity of petitioners' property. The declarations did not specify use of petitioners' property and none indicated use above the mean high tide line.

33. At the continued hearing on May 26, 1983, the Commission, by a vote of 10-2, adopted the Staff Report and Recommendation. In its decision the Commission, relying on and quoting from its Public Access Guidelines, reimposed special condition No. 1 (the access condition), as identified *supra* in Paragraph No. 25 of this petition.

34. At both the hearing on April 28, 1983, and the continued hearing on May 26, 1983, petitioners offered to record, under protest, the deed restriction required by the Commission. This deed restriction was offered by petitioners in order to preserve the rights of both parties pending further Court review, while allowing demolition of the substandard house and construction of the replacement house to begin. A copy of the proposed Deed Restriction is attached hereto as Exhibit E and is incorporated herein by this reference.

35. On the recommendation of its Executive Director, attached hereto as Exhibit F and incorporated herein by this reference, the Commission refused to allow dedication under protest and instead required "the Nollans to submit an offer . . . that does not contemplate a legal challenge to the Commission's action on the permit."

36. Subsequent to petitioners' request for preparation of the administrative record, and three weeks after the Commission's decision, petitioners' counsel received the revised Staff Report and Recommendation which is attached hereto as Exhibit G and is incorporated herein by this reference.

37. An extensive number of public beaches are available within three miles either side of petitioners' property. In particular, the Faria County Park, an oceanside public park with a public beach and recreation area, is within one-quarter miles of the Nollan property and was donated to the public by the Faria family, the predecessors in interest of the land held by the Faria Beach Trust. In addition, the "Cove," a privately-owned beach on which public access is allowed, is located within 1,800 feet of the Nollan property.

38. The public has not acquired, through use or legislative authorization, any prescriptive easement or the right to use the dry sand above the main high tide line on petitioners' property.

39. Any view of the coastline from the old Pacific Coast Highway and also from the new freeway will not be affected by demolition and reconstruction of petitioners' single family residence. A copy of Mr. Nollans' declaration, submitted to the Commission prior to its May 26, 1983 hearing is attached hereto as Exhibit H and is incorporated herein by this reference.

THE PUBLIC ACCESS GUIDELINES

40. Respondent, Commission, is empowered and has a duty to adopt only such guidelines as are not in conflict with the provisions of the Coastal Act, nor to enlarge its powers in violation thereof. Public Resources Code § 30620 (a)(3) provides in relevant part that the Commission shall adopt

> "[i]nterpretive guidelines designed to assist local governments, the regional commissions, the commission, and persons subject to the provisions of this chapter in determining how the policies of this division shall be applied in the coastal zone prior to certification of local coastal programs; provided however, that *such guidelines shall not supersede, enlarge, or diminish the powers or authority of any regional commission, the commission or any public agency.*"
> (Emphasis added.)

41. Respondent, Commission, has promulgated the Public Access Guidelines, attached hereto as Exhibit A, pursuant to the Coastal Act purportedly to enable it to carry out the purposes and provisions of the Act.

42. Respondent's Public Access Guidelines serve as its interpretation of the Coastal Act's requirements and serve as directives as to how the policies, purposes, and express provisions of the Coastal Act shall be applied.

43. Said Public Access Guidelines "explain the public access provisions of the [coastal] Act [and] . . . indicate when the public access provisions are applicable to a given project and the type (vertical and lateral) and amount (including area and appropriate uses) of access which should be provided." Public Access Guidelines, Part No. I at 1.

44. Despite the provisions of Public Resources Code § 30212, the Commission's Public Access Guidelines provide:

> "*[A]ll* new development resulting in any intensification of land use generates sufficient burdens on public access to require access conditions in conjunction with that development." Public Access Guidelines, Part No. 2(B) at 5.

45. The Commission's Public Access Guidelines provide additionally that the necessity for accessways in development projects is determined by "the appropriateness (*i.e.*, need) of access rather than on the type of development proposed." Public Access Guidelines, Part No. II(B) at 7.

46. Despite the provisions of Public Resources Code § 30212(a)(2), said Public Access Guidelines provide further at Part No. III(D)(3) as regards the necessity to require that lateral accessways be dedicated as a condition to coastal development permit approval as follows:

> "Although the question of whether adequate access exists nearby applies to the siting of both lateral and vertical access, the Commission has generally found that access along the shoreline is not adequate to serve the public needs. . . ."

47. Petitioners are informed and believe, and thereon allege, that respondent requires the dedication of lateral and vertical access easements as a condition to approval of projects which do not constitute "new development" and without regard to the type, nature, or character of the development proposed.

48. The Public Access Guidelines are invalid in that: (a) they are in excess of the Commission's jurisdiction and authority to promulgate or implement, (b) they contravene the provisions of the Coastal Act because they require dedication of accessways not related to "new development," (c) they contravene the provisions of the Coastal Act because they require dedication of accessways without consideration of whether adequate access exists nearby, and (d) they contravene due process guarantees because they require dedication of public accessways without regard to the type, nature, or character of the development proposed or the burden on access created thereby.

49. The Public Access Guidelines are invalid in that the Commission's interpretation of what constitutes "new development" contained in said guidelines violates the statutory distinction between "new development projects" and "development." Said failure to maintain the legislative distinction between "new development projects" and "development" results in invalid vertical and lateral access dedication requirements.

50. The Public Access Guidelines are invalid in that they contravene article I, section 19 of the Constitution of the State of California and the Fifth and Fourteenth Amendments to the Constitution of the United States, are in excess of the Commission's jurisdiction and authority to promulgate, and contravene the provisions of the Coastal Act because they operate to take private property for public use without payment of just compensation.

51. The Public Access Guidelines are invalid in that they contravene the Fifth and Fourteenth Amendments to the Constitution of the United States, are in excess of the Commission's jurisdiction and authority to promulgate, and contravene the provisions of the Coastal Act because they subject coastal development permit approval to terms, conditions, and dedication requirements which bear no reasonable, rational, or substantial relationship to the activity which government approval is required, thereby amounting to a violation of petitioners' due process rights.

BASIS FOR RELIEF

52. Respondent's decision on remand remains invalid under Code of Civil Procedure § 1094.5 in that the Commission exceeded its jurisdiction, denied petitioners a fair hearing, based its decision on invalid guidelines, and abused its discretion as set forth more fully below.

53. Respondent exceeded its jurisdiction by following its guidelines and placing an access condition on the approval of petitioners' permit, which condition is not authorized by the Coastal Act in that:

a. The access condition imposed is inconsistent with the need to protect the constitional rights of private owners as expressly provided for in Public Resources Code §§ 30001.5 and 30210.

b. Respondent has exercised its power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation, contrary to the specific provisions of Public Resources Code § 30010.

c. Respondent proceeded in a manner contrary to the provisions of Public Resources Code § 30212 in that public access conditions are not authorized where adequate public access already exists nearby petitioners' property.

d. Respondent proceeded in a manner contrary to the provisions of Public Resources Code § 30212 in that said section authorizes access only in "new development projects." Petitioners' construction of a replacement single-family dwelling on the property is not a "new development project" under the Coastal Act.

e. Respondent was violated the explicit legislative directive set forth in Public Resources Code § 30214 to assure that public access policies are carried out in a reasonable manner which balances the public's right to access with the equities and rights of individual property owners.

f. Respondent has violated Public Resources Code § 30005.5 by going beyond its police power authority in requiring an exaction where petitioners are creating no burden or alternatively, by requiring an exaction which bears no reasonable relationship to any asserted burden.

54. Respondent failed to grant petitioners a fair hearing and committed a prejudicial abuse of discretion in that respondent failed to give petitioners a reasonable opportunity to be heard, or to examine or rebut Commission-solicited declarations and evidence, in violation of petitioners' rights of due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 7 of the California Constitution.

55. Respondent committed an abuse of discretion prejudicial to petitioners in that it failed to proceed in the manner required by law by placing an access condition on the approval of petitioners' permit, which condition is not authorized by the Coastal Act for the reasons stated in Paragraph No. 53 a through f above and incorporated by reference as if set forth fully herein.

56. Respondent committed an abuse of discretion prejudicial to petitioners in that it failed to proceed in the manner required by law by placing an access condition on the approval of petitioners' permit, which condition bears no reasonable relationship to any asserted burden created by the proposed home and constitutes a taking of private property for public use in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 19 of the California Constitution.

57. Respondent committed an abuse of discretion prejudicial to petitioners in that its decision to impose access conditions upon petitioners' permit is not supported by findings in that:

a. the findings fail to demonstrate "either immediate impact or verifiable, nonspeculative cumulative impact;"

b. the findings do not show that petitioners' replacement housing "will burden the public's otherwise available access to the beach;"

c. the findings made are speculative and unclear, and fail to adequately apprise petitioners or the Court of the true basis for respondent's action; and

d. the findings made are standardized findings transferred from the Commission's Public Access Guidelines and other applications rather than real findings based on evidence from this application.

58. Respondent committed an abuse of discretion prejudicial to petitioners in that the findings made in support of the inposition of the access condition are not supported by either the independent weight of the evidence or substantial evidence in light of the whole record in that:

a. the finding that replacing the house will intensify the use of the property is not supported by evidence and, in fact, is contradicted by evidence;

b. the finding that replacing the house with another house in the same location will discourage the public from visiting the shoreline because of physical proximity is not supported by evidence or common sense;

c. the finding that replacing the house will consume existing road capacity and off-street parking and further congest existing access roads and recreational areas is not supported by evidence and, in fact, is contradicted by evidence;

d. the finding that replacing the house will increase the use of the beach by residents and guests is not supported by evidence and, in fact, is contradicted by evidence;

e. the finding that petitioners' dry sand has been used by the public for access and passive recreation is not supported by evidence;

f. the finding that replacing the house will potentially adversely affect the use of the beach by many is not supported by evidence and, in fact, is contradicted by evidence; and

g. no supportable finding was made as to any reasonable relationship between the construction of a new dwelling on the property and the exaction of private property made by respondent.

59. Such action by respondent is arbitrary and capricious within the meaning of Government Code § 800 and, thus, petitioners may be awarded attorneys' fees under this section.

60. Respondent, Commission, has failed to set or hold a hearing on petitioners' permit application within 49 days after remand by this Court, when their application was pending before the Commission, in apparent violation of Public Resources Code § 30621. Petitioners have not waived their right to a timely hearing on remand.

61. At all times herein, respondent owed a duty to petitioners to perform its duties in accordance with the provisions of the Coastal Act and the California and Federal Constitutions and to adopt only such Public Access Guidelines as are authorized and consistent therewith.

62. Respondent, Commission, has promulgated Public Access Guidelines, described herein, in excess of its jurisdiction and without authority and thereby failed to perform its duties in accordance with applicable law.

63. Respondent, Commission, has implemented its Public Access Guidelines in excess of its jurisdiction and without authority and thereby failed to perform its duties in accordance with applicable law.

64. Petitioners have exhausted the available administrative remedies required to be pursued by them by complying with all rules, regulations, and statutes provided for under the Coastal Act (Pub. Res. Code §§ 30000 *et seq.*).

65. Petitioners do not have a plain, speedy, and adequate remedy in the ordinary course of law.

66. Petitioners are entitled to judicial review in this Court of the Commission's decision on remand, and may obtain such review by means of a supplemental petition for writ of mandate. *Giannini Controls Corp. v. Superior Court*, 240 Cal. App. 2d 142, 151, 156 (1966).

67. Unless respondent is compelled to perform its legal duties as prescribed by law, petitioners will be irreparably injured.

68. On or about June 1, 1983, and within 10 days of the Commission's decision on May 26, 1983, petitioners made a timely request to the California Coastal Commission for the preparation of the administrative record. As soon as possible, petitioners will obtain a copy and enter it into the record. At such time, petitioners, if necessary, will ask this Court for leave to amend their petition upon consideration of such record.

WHEREFORE, petitioners pray that:

1. a peremptory writ of mandate be issued directing respondent to delete the special access conditions from its approval of petitioners' permit and approve said permit without such conditions;

2. a peremptory writ of mandate be granted by this Court requiring and compelling respondent to:

a. set aside those portions of the Public Access Guidelines which nullify the statutory distinction between "new development projects" and development" and require the dedication of private property for public use in projects that are other than new development projects and refrain from the enforcement of said complained of guideline provisions;

b. adhere to the duties as described by this Court; and

c. perform its statutory and constitutional duties in accordance with the Coastal Act of 1976, applicable state law, and the State and Federal Constitutions;

3. reasonable attorneys' fees be awarded under Government Code § 800, Code of Civil Procedure § 1021.5, and any other applicable law;

4. petitioners are to recover the costs of this action; and

5. other and further relief as the Court deems just and proper be awarded petitioners.

DATED: July 1, 1983.

Respectfully submitted,

RONALD A. ZUMBRUN
HAROLD J. HUGHES

By _____
HAROLD J. HUGHES

AFFIDAVIT OF SERVICE BY MAIL

Attorney:	No: 86-133 October Term, 1986
JOHN K. VAN DE KEMP Attorney General of the State of California ANDREA SHERIDAN ORDIN Chief Assistant Attorney General N. GREGORY TAYLOR Assistant Attorney General JAMEE JORDAN PATTERSON Deputy Attorney General	JAMES PATRICK NOLLAN AND MARILYN HARVEY NOLLAN Appellants, v. CALIFORNIA COASTAL COMMISSION, Appellee.
110 West A Street, Suite 700 San Diego, California 92101	

I, THE UNDERSIGNED, say: I am a citizen of the United States, 18 years of age or over, employed in the County of San Diego in which county the below stated mailing occurred, and not a party to the subject cause. My business address is 110 West A Street, Suite 700, San Diego, California 92101.

I have served the within MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS as follows: To Joseph F. Spanoil, Jr., Clerk, Supreme Court of the United States, Washington, D.C. 20543, an original and 40 copies, of which a true and correct copy of the document filed in this cause is hereunto affixed; AND, by placing three copies in a separate envelope addressed for and to each addressee named as follows:

Timothy A. Bittle John H. Lee PACIFIC LEGAL FOUNDATION 555 Capitol Mall, Suite 350 Sacramento, CA 95814	Ronald A. Zumbrun Robert K. Best PACIFIC LEGAL FOUNDATION 555 Capitol Mall, Suite 350 Sacramento, CA 95814

Each envelope was then sealed and with the postage prepaid deposited in the United States Mail by me at San Diego, California, on the _____ day of _____ 1986.

There is a delivery service by United States Mail at each place so addressed or regular communication by United States Mail between the place of mailing and each place so addressed.

I declare under penalty of perjury that the foregoing is true and correct.

Dated at San Diego, California, _____, 1986.

_____
JAMEE JORDAN PATTERSON

Subscribed and sworn to before me
this _____ day of _____.

_____
Notary Public in and for said County and State

MOTION

Supreme Court, U.S.
FILED
DEC 9 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In The

Supreme Court of the United States

October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

RESPONSE OF APPELLANTS TO MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

Appeal Docketed July 29, 1986
Probable Jurisdiction Noted October 20, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES CITED ii

I. THE FEDERAL QUESTION OF WHETHER THE APPLICATION OF CALIFORNIA PUBLIC RESOURCES CODE SECTION 30212 TO THE NOLLANS VIOLATED THE "TAKING" CLAUSE WAS RAISED AND DECIDED IN THE COURTS BELOW 3

II. THE NOLLANS HAVE NOT WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW 7

CONCLUSION 13

TABLE OF AUTHORITIES CITED

Page

Cases

Agins v. City of Tiburon, 24 Cal. 3d 266 (1979), aff'd on other grounds, 447 U.S. 255 (1980) 6, 10

Air Quality Products, Inc. v. State of California, 96 Cal. App. 3d 340 (1979) 10

Atkisson v. Kern County Housing Authority, 59 Cal. App. 3d 89 (1976) 9

Bagley v. Washington Township Hospital District, 65 Cal. 2d 499 (1966) 9

Candid Enterprises, Inc. v. Grossmont Union High School District, 39 Cal. 3d 878 (1985) 11, 12

City of Long Beach v. Bozek, 31 Cal. 3d 527 (1982) 8

Committee to Defend Reproductive Rights v. Myers, 29 Cal. 3d 252 (1981) 9

County of Imperial v. McDougal, 19 Cal. 3d 505 (1977) 11

Georgia-Pacific Corp. v. California Coastal Commission, 132 Cal. App. 3d 678 (1982) 7

Grupe v. California Coastal Commission, 166 Cal. App. 3d 148 (1985) 5

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) 7

J-Marion Co. v. County of Sacramento, 76 Cal. App. 3d 517 (1977) 11

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 7

Keystone Bituminous Coal Association v. Duncan, No. 85-1092 (argued Nov. 10, 1986) 7

Liberty v. California Coastal Commission, 113 Cal. App. 3d 491 (1980) 7

Parrish v. Civil Service Commission of the County of Alameda, 66 Cal. 2d 260 (1967) 9

TABLE OF AUTHORITIES—Continued

Page

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 7

Perry v. Sindermann, 408 U.S. 593 (1972) 9

Pfeiffer v. City of La Mesa, 69 Cal. App. 3d 74 (1977) 10

Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110 (1973) 6

Statutes

Cal. Code of Civil Procedure § 1094.5 11

Cal. Pub. Res. Code § 30010 (West 1986) 3, 6

§ 30212 3

No. 86-133

In The

Supreme Court of the United States

October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

RESPONSE OF APPELLANTS TO MOTION OF APPELLEE CALIFORNIA COASTAL COMMISSION TO DISMISS

Together the two arguments presented in the Motion of Appellee, California Coastal Commission, to Dismiss (Motion) ask this Court to rule that California property owners have no opportunity for judicial review of a permit condition requiring a dedication of property which is alleged to cause a "taking" in violation of the Fifth and Fourteenth Amendments. First, the commission argues that such claims cannot be reviewed in proceedings in which damages are not sought. To establish a claim for damages the property owner would have to comply with

the condition and make the dedication. The commission then argues that having made the dedication the property owner has complied with the permit and is deemed to have waived any challenge to its conditions. These arguments, taken together or individually, have no merit.

The motion includes a special section entitled "Statement of Facts" in which it presents facts concerning the Nollans' property and their new house which materially distort the actual circumstances by citing to erroneous statements included by the commission staff in the limited portion of the record submitted to the Court in the Appendix to the Jurisdictional Statement. The portion of the record containing the correct facts on lot size, lot coverage by the new house, and beach area lost to the dedication requirement will be included in the Joint Appendix. Since these factual matters do not appear to bear on the legal arguments raised by the commission in this motion, the relevant evidentiary materials are not submitted with this motion and the true facts concerning the Nollans' property and their project to rebuild their house will be presented in appellants' brief on the merits and the Joint Appendix. However, for the Court's information the Nollans' lot size is approximately 3,800 square feet (not 2,800 square feet); lot coverage by the new house is approximately 1,500 square feet (not 2,464 square feet); and the beach area taken by the dedication is approximately 30% of the total lot (not 10 feet). *See* Appendix to Motion at A-7[1]; Clerk's Transcript at 403.

---

[1] In its reply to the supplemental petition for writ of administrative mandamus the commission admitted the allegations in Paragraph No. 26 that the dedication included 30% of the property.

I

THE FEDERAL QUESTION OF WHETHER THE APPLICATION OF CALIFORNIA PUBLIC RESOURCES CODE SECTION 30212 TO THE NOLLANS VIOLATED THE "TAKING" CLAUSE WAS RAISED AND DECIDED IN THE COURTS BELOW

The Motion is based upon a mischaracterization of the claim presented by the Nollans. Citing to Page No. 22 of the Jurisdictional Statement, the commission states:

> "The Nollans assert that despite the validity of the access condition imposed, they were entitled to just compensation." Motion at 6.

The Nollans have never conceded, at Page No. 22 of the Jurisdictional Statement nor anywhere else, "the validity of the access condition." The Nollans assert that the condition on their permit is *invalid* because it will take their property from them for public use without providing just compensation. Page No. 22 of the Jurisdictional Statement states "that it is within the state's police power to take private property to obtain expanded public access along the coast." It is the Nollans' claim, however, that to take their property, the state must exercise its power of eminent domain and pay fair value. Jurisdictional Statement at 7. Since the commission is not authorized to exercise the state's eminent domain power through its authority to grant or deny a coastal development permit (Cal. Pub. Res. Code § 30010 (West 1986)), the invalid condition must be set aside.

The commission's argument confuses the remedy sought with the claim asserted. It is, of course, both true and obvious that the Nollans' petition for writ of administrative mandamus did not pray for damages. It is

false, however, to state that the federal question was not raised. It was raised before the commission.[2] The supplemental petition for writ of administrative mandamus at Paragraph No. 56 expressly alleges as a "basis for relief" that the commission placed

> "an access condition on the approval of petitioners' permit, which condition bears no reasonable relationship to any asserted burden created by the proposed home and constitutes a taking of private property for public use in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article I, section 19 of the California Constitution." Appendix to Motion at A-15.

The trial court's original decision decided this constitutional question in favor of the Nollans:

> "The Commission may *constitutionally* require a grant of public access only when the facts in the case before it demonstrate that a proposed development will place a burden on public access to the coast. No such burden is shown by the facts in the administrative record." Clerk's Transcript at 235 (emphasis added).

The constitutional issue, having been decided by the trial court in its first decision, was not directly discussed in the second decision. The trial court considered it at that point to be "law of this case." Jurisdictional Statement, Appendix at D-15. However, the trial court explained that the basis for the second judgment was the

---

[2] The deed restriction offered to the commission by the Nollans stated:

> "This Deed Restriction is executed under protest and shall not be construed as a waiver by the applicants and permit holders of their rights, if any, to be free from government-compelled dedication of private property for public use without just compensation, in violation of the Fifth Amendment." Clerk's Transcript at 348.

failure of the commission to make the constitutionally required showing directed by the first decision:

> "Since no appeal was taken from this Court's first decision, which held that the evidence in the record did not support a finding that petitioners' proposed development would burden the public, the same decision is compelled by the fact that no new evidence of any relevance has been added to the record this time around." Jurisdictional Statement, Appendix at D-17.

Although the Court of Appeal gave the constitutional argument scant attention, it clearly ruled on it, concluding that the constitutional taking claim in this case was controlled by the decision in *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148 (1985).

> "The *Grupe* court also held that the exaction did not constitute a 'taking' because although it caused a diminution in the value of Grupe's property, it did not deprive him of the reasonable use of his property." Jurisdictional Statement, Appendix at A-6.

It is surprising to note that the commission's argument in this Motion is directly contrary to the argument it made to this Court in the Motion of Appellee, California Coastal Commission, to Dismiss or Affirm (First Motion). In the First Motion, the commission's principal argument was that the Court of Appeal had addressed the constitutional taking issue and decided it in a manner consistent with this Court's precedents. First Motion at 7-9. The commission expressly stated:

> "The court also relied on the *Grupe* court's reasoning that although the access condition caused a diminution in the value of the property, it did not deprive the owners of the reasonable use of the property therefore the condition did not constitute a taking.

> "This analysis clearly comports with this Court's test for determining whether a taking has occurred." First Motion at 7 (citation omitted).

The commission's new argument that no such question was ever presented in the courts below is a distortion of the case before the Court of Appeal.

The fact that the Nollans did not request damages means only that this Court does not face the issue in this case of whether monetary damages are a constitutionally compelled remedy to be mandated over the objections of the state. Under California civil procedure, challenges to the validity of a condition on a permit are to be raised in a proceeding in mandamus.

> "The gravamen of plaintiff's complaint is that the city refused to issue the permit unless plaintiff complied with an assertedly invalid condition. The appropriate method by which to consider such a claim is by a proceeding in mandamus under section 1094.5 of the Code of Civil Procedure." *Selby Realty Co. v. City of San Buenaventura*, 10 Cal. 3d 110, 128 (1973).

In this case the Nollans complied with that California procedure and with the law established by both the State Supreme Court and the State Legislature that invalidation through a proceeding in mandamus (and not damages) is the preferred remedy when the commission imposes a permit condition which results in the taking of property in violation of the Fifth and Fourteenth Amendments. *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980); Cal. Pub. Res. Code § 30010 (West 1986) (the commission is not authorized to exercise its power to grant a permit "in a maner which will take or damage private property for public use, without payment of just compensation").

California cases in which a court has found a condition on a permit issued by the commission to be invalid have applied this remedy. *See Georgia-Pacific Corp. v. California Coastal Commission*, 132 Cal. App. 3d 678 (1982); *Liberty v. California Coastal Commission*, 113 Cal. App. 3d 491 (1980).

The commission's Motion cites no case of this Court for authority for its contention that this Court will not take jurisdiction of a challenge to a state statute based on the "Taking" Clause unless a prayer for damages was prosecuted in the lower courts. There are, however, a number of precedents supporting jurisdiction to review a "taking" claim in the absence of any claim for money damages. *See, e.g., Keystone Bituminous Coal Association v. Duncan*, No. 85-1092 (argued Nov. 10, 1986); *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264 (1981); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

The federal constitutional issue presented in this case was raised and decided in the courts below. Jurisdiction in this Court is not defeated by the Nollans' decision to pursue only the invalidation remedy, which is the remedy established under state law as the preferred remedy for the Nollans' constitutional claim.

II

THE NOLLANS HAVE NOT WAIVED THE RIGHT TO CHALLENGE THE ACCESS CONDITION UNDER STATE LAW

Contrary to the assertion by the commission there is no general rule under California state law that a permit applicant has no option but to comply with unlawful

demands of a public agency in order to obtain promptly a permit for which he or she is fully eligible. Such a rule, if it existed, would raise serious state and federal constitutional questions if applied to force a permit applicant to the Hobson's choice of waiving a constitutional right or foregoing the permit to which he or she is otherwise entitled.

The possibility for serious abuse of individual rights under such a rule is amply demonstrated by the conduct of the commission in the Nollans' case. The Nollans offered the required deed restriction, asking only to reserve the right to have a court of law review the dedication requirement for conformance with constitutional standards. The commission rejected this offer and instead required "the Nollans to submit an offer . . . that does not contemplate a legal challenge to the Commission's action on the permit." Appendix to Motion at A-3 and A-9.[3]

In California, "the act of filing suit against a governmental entity represents an exercise of the right of petition and thus invokes constitutional protection." *City of Long Beach v. Bozek,* 31 Cal. 3d 527, 534 (1982). Thus, the commission demanded that the Nollans sacrifice two constitutional rights. They were ordered to give up both the right not to have their property taken without just compensation and the right to petition the courts for redress of a constitutional grievance.

---

[3] In its reply to the supplemental petition for writ of administrative mandamus the commission admitted the allegations in Paragraph Nos. 6 and 35 concerning the offer of dedication with reservation of rights as set out in footnote No. 2, *supra.*

California law prohibits state agencies from conditioning government benefits on the recipient's waiver of constitutional rights. In *Bagley v. Washington Township Hospital District,* 65 Cal. 2d 499 (1966), the California Supreme Court ruled that public employment could not be conditioned upon employees agreeing to refrain from political campaign activities. In *Parrish v. Civil Service Commission of the County of Alameda,* 66 Cal. 2d 260 (1967), the California Supreme Court invalidated a statute requiring welfare recipients as a condition of continued aid to submit to warrantless searches of their homes. In *Atkisson v. Kern County Housing Authority,* 59 Cal. App. 3d 89 (1976), the California Court of Appeal ruled that recipients of low-income housing could not be forbidden from living with someone of the opposite sex not related by blood or marriage. Recently in *Committee to Defend Reproductive Rights v. Myers,* 29 Cal. 3d 252 (1981), the California Supreme Court ruled that Medi-Cal assistance to pregnant women could not be conditioned upon forfeiture of their constitutional rights to choose an abortion.

Federal law is in accord. In *Perry v. Sindermann,* 408 U.S. 593 (1972), this Court made it clear that a governmental benefit could not be conditioned on the waiver of a constitutional right.

> "For if the government could deny a benefit to a person because of his constitutionally protected [rights], his exercise of those freedoms would in effect be penalized and inhibited." 408 U.S. at 597.

Numerous cases of this Court applying this general principle were collected in the *Perry* opinion. *Id.*

The commission's suggestion that the Nollans should be deemed to have waived their rights to seek judicial review of the unconstitutional obligation imposed on them can have no merit in light of the clear authority against unconstitutional conditions and coerced waivers of constitutional rights. The commission's argument rests primarily on the case of *Pfeiffer v. City of La Mesa,* 69 Cal. App. 3d 74 (1977). In *Pfeiffer* the city placed a condition on a permit approval requiring the landowner to construct certain improvements which the landowner alleged were to benefit other property. The landowner constructed the improvements and then brought an action in inverse condemnation seeking damages from the city for the costs of the improvements. *Id.* at 76. Contrary to the commission's assertion, the court did not rule that no claim could be stated against the city. It held that "the proper method to test the validity of conditions in a building permit is a proceeding in mandamus under Code of Civil Procedure section 1094.5." *Id. Pfeiffer* is an articulation of the rule stated by the California Supreme Court in *Agins v. City of Tiburon, supra,* that a landowner "may attempt through declaratory relief or mandamus to invalidate the ordinance as excessive regulation in violation of the Fifth Amendment . . . . He may not, however, elect to sue in inverse condemnation and thereby transmute an excessive use of the police power into an unlawful taking for which compensation in eminent domain must be paid." 24 Cal. 3d at 273. The recognized rationale for the rule in California is to protect "governmental fiscal planning" from the threat of unforeseen claims for "substantial monetary damages." *Air Quality Products, Inc. v. State of California,* 96 Cal. App. 3d 340, 352 (1979). The Nollans complied with this rule; they

challenged the unlawful permit condition in an action for mandamus under California Code of Civil Procedure § 1094.5 and did not request damages. Appendix to Motion at A-1.

The commission's reliance on *County of Imperial v. McDougal,* 19 Cal. 3d 505 (1977), and *J-Marion Co. v. County of Sacramento,* 76 Cal. App. 3d 517 (1977), is also misplaced. These cases hold that a subsequent property owner cannot challenge a condition which his predecessor in interest accepted without protest or voluntarily agreed to have included in a land use approval. These cases have no relevance here. The Nollans are not attempting to avoid commitments voluntarily made by their predecessor in interest and passed to them. They steadfastly maintained before the commission that the access condition was invalid and that they would refuse to make the dedication unless they could retain the right to seek judicial review of its validity.

Any illusion that a property owner who has accepted a permit retains no cause of action under California law to challenge an unlawful condition was recently dispelled by the California Supreme Court in *Candid Enterprises, Inc. v. Grossmont Union High School District,* 39 Cal. 3d 878 (1985). To satisfy a condition on the approval of a condominium project Candid Enterprises was required under a secured agreement with the school district to pay certain "school-impact fees" at the time it commenced construction. *Id.* at 883. When Candid began construction it paid some fees under protest and brought an action in mandamus to set aside the agreement and require return of the fees paid. *Id.* at 884 The school district argued that by commencing construction under the permit Candid had waived both

the right to challenge the agreement and the right to seek return of the fees paid. Because the court ruled that the district could collect the fees, it did not reach the question of whether Candid had waived its right to seek return of the fees paid. *Id.* at 891 n.7. However, the court did address and decide the question of whether the requirement to pay such fees was subject to challenge, clearly ruling that the mandamus remedy had not been waived:

> "Respondents also press the procedural point that their demurrer should have been sustained. This argument, however, is untenable. Although the writ of administrative mandate does not lie because the Board was not required by law to grant petitioner a hearing . . . the writ of ordinary mandate is available." *Id.* at 885 n.3.

The cases relied on by the commission do not stand for the constitutionally questionable proposition that applicants for a government permit in California may be required to waive a constitutional right as a condition of obtaining a permit for which they are otherwise eligible. Although California land use law does not recognize a damages remedy for unlawful permit conditions and although fees once paid may not be recoverable, a property owner may challenge such condition by a proceeding in mandamus. The Nollans have conformed to this requirement. Their action in proceeding to demolish and reconstruct the home on their property does not alter their continuing dispute with the commission over whether they must execute and record the deed restriction required by their permit.

———o———

CONCLUSION

For the reasons set forth above, the Motion of Appellee, California Coastal Commission, to Dismiss should be denied.

DATED: December 9, 1986.

Respectfully submitted,

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

JOINT

APPENDIX

VOL. I

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In The

Supreme Court of the United States

October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

JOINT APPENDIX
VOLUME I

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

JOHN K. VAN DE KAMP
Attorney General
ANDREA SHERIDAN ORDIN
Chief Assistant
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
*JAMEE JORDAN PATTERSON
*COUNSEL OF RECORD
Deputy Attorney General
110 West A Street, Suite 700
San Diego, CA 92101
Telephone: (619) 237-6050

Attorneys for Appellee

Appeal Docketed July 29, 1986
Probable Jurisdiction Noted October 20, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Chronological List of Relevant Docket Entries 1

Application for coastal development permit (First Administrative Record (AR 1) at 3-11) 3

Nollans' objection to special conditions (AR 1 at 57-68) 14

Plot plan and exterior elevations (AR 1 at 84, 86) 24

Transcript of April 7, 1982, commission hearing (AR 1 at 88-91) 27

Administrative Permit No. 4-82-90 (AR 1 at 41-44) 31

Judge Peck's statement of decision and first judgment (Clerk's Transcript (CT) at 233-38) 36

Coastal Commission staff report on Application No. 4-82-90 dated June 23, 1983 (Second Administrative Record (AR 2) at 128-81) 41

Excerpt from Surfing California by Allan B. Wright, Jr. (1973) (AR 2 at 28-29) 81

Excerpt from Surfing Guide to Southern California, by David H. Stern (1977) (AR 2 at 30-31) 82

Letter to Mel Nutter, Chairman, California Coastal Commission, dated May 26, 1983, from Michael David Cox, Environmental Defense Center (AR 2 at 76) 83

Memorandum to Cindy Long from Lewis Allen, Senior Lands Agent, Office of the Attorney General, dated May 25, 1983 85

Excerpt from Coastal Zone '80: The San Diego Regional Coastal Access Study, by Dennis Prescott, Vol. II (AR 2 at 301-13) 87

Excerpt from Coastal Zone '80: Beach Access Problems, Programs and Progress, by David Brower, Vol. II (AR 2 at 314-27) 121

TABLE OF CONTENTS—Continued

Page

Excerpt from Coastal Recreation: A Handbook for Planners and Managers, by Robert B. Ditton and Mark Stephens (January, 1976) (AR 2 at 336-48) 161

Excerpt from the Cumulative Impacts of Shorezone Development at Lake Tahoe, by Phillips, Brandt, Reddick, McDonald, and Grefe (February, 1978) (AR 2 at 349-71) 174

Excerpt from Coastal Zone Management Journal—Environmental Resources and Law, Marc J. Hershman (1979) (AR 2 at 372-80) 201

Excerpt from Recreational Access to the Coastal Zone, Sea Grant Advisory Program (AR 2 at 381-84) 213

Excerpt from Comprehensive Ocean Area Plan: California Department of Ocean and Navigation Development and Supplement (1971) (AR 2 at 385-95) 221

Excerpt from Fish & Wildlife in the Marine and Coastal Zone, California Department of Fish and Game (1971) (AR 2 at 396-99) 247

Excerpt from California Coastline: Preservation and Recreation Plan, Department of Parks and Recreation (1971) (AR 2 at 400-11) 251

Excerpt from Ventura County Beaches Study, California Department of Parks & Recreation (June, 1976) (AR 2 at 406-11) 255

Sixteen slides of Faria Beach Tract (AR 2 at 510-25) 261

Volume II

Transcript of April 28, 1983, hearing before the California Coastal Commission (AR 2 at 530-49) 277

TABLE OF CONTENTS—Continued

Page

Transcript of May 26, 1983, hearing before the California Coastal Commission (AR 2 at 550-83) 292

Transcript of June 23, 1983, hearing before the California Coastal Commission (AR 2 at 584-87) 325

Supplemental petition for writ of mandate, minus Exhibits C, D, and G (CT at 249-94, 345-53, 409-15) 328

Declaration of James Nollan (CT at 565-70) 399

Answer to supplemental petition (CT at 581-86) 404

Judge Peck's second judgment and statement of decision (CT at 687-96) 412

Opinion of the Court of Appeal (177 Cal. App. 3d 719) 421

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 3, 1982—Petition for Writ of Administrative Mandamus filed in Ventura County Superior Court.

September 17, 1982—Amended Petition for Writ of Administrative Mandamus.

October 18, 1982—Motion of Petitioners to Issue Writ of Administrative Mandamus, and Memorandum of Points and Authorities in Support Thereof.

December 2, 1982—Reply by Way of Answer to the Amended Petition for Writ of Administrative Mandamus, and Memorandum of Points and Authorities in Support Thereof.

December 13, 1982—Reply Memorandum of Points and Authorities in Support of Petition for Writ of Administrative Mandamus.

January 12, 1983—Objections of Respondent to the Proposed Judgment and Statement of Decision.

January 18, 1983—Minute Order.

January 18, 1983—Statement of Decision and Judgment Granting Peremptory Writ of Mandamus signed by Judge William L. Peck.

February 11, 1983—Return to Peremptory Writ of Mandamus.

March 21, 1983—Supplemental Return to Peremptory Writ of Mandamus.

July 15, 1983—Supplemental Petition for Writ of Administrative Mandamus.

October 21, 1983—Motion of Petitioners to Issue Writ of Administrative Mandamus, and Memorandum of Points and Authorities in Support Thereof.

November 25, 1983—Respondent's Reply to Supplemental Petition for Writ of Administrative Mandamus,

Opposition to Motion for Issuance of Writ, and Memorandum of Points and Authorities in Support Thereof.

January 19, 1984—Respondent's Proposed Statement of Decision, and Respondent's Objections to Petitioners' Proposed Statement of Decision.

January 19, 1984—Minute Order.

February 15, 1984—Statement of Decision and Judgment Granting Peremptory Writ of Mandamus signed by Judge William L. Peck.

March 8, 1984—Return to Peremptory Writ of Mandamus.

March 30, 1984—Respondent's Notice of Appeal to the California Court of Appeal, Second Appellate District.

January 24, 1986—Decision of the California Court of Appeal, Second Appellate District, Reversing the Judgment of the Superior Court.

February 18, 1986—Decision of the California Court of Appeal, Second Appellate District, Certified for Publication.

March 5, 1986—Petition for Review filed with the California Supreme Court.

April 30, 1986—Order denying review by the California Supreme Court.

BEFORE THE
CALIFORNIA COASTAL COMMISSION

State of California, Edmund G. Brown Jr., Governor

APPLICATION FOR COASTAL DEVELOPMENT PERMIT

California Coastal Commission
SOUTH CENTRAL COAST DISTRICT
735 STATE STREET, (805) 963-6871
BALBOA BUILDING, SUITE 612
SANTA BARBARA, CA 93101

Type of applications

[X] *Standard Permit*

[ ] *Administrative Permit* (May be applicable if development is one of the following: (a) improvement to existing structure and costing less than $50,000; (b) any new development costing less than $50,000; (c) single family dwelling; or (d) four dwelling units or less, within any incorporated area, that does not require demolition or subdivision of land.)

SECTION I. APPLICANT

1. Name, mailing address and telephone number of all applicants.

   Faria Beach Trust and James P. and Marilyn H. Nollan, P.O. Box 1178, 407 So. Mansfield Ave., Los Angeles, Calif. 90036, Ventura, California 93002, (213) 936-3972 WK 213-485-4232.
   (Area code/daytime phone number)

   Is the applicant a lessee of the project site?

   [X] Yes [ ] No

   If yes, the lessor must be a co-applicant.

2. Name, mailing address and telephone number of applicant's representative, if any.

William H. Langlois, Architect
1451 East Main St.
Ventura, Calif. 93003 (805) 648-3196
(area code/daytime phone number)

For office use only #4-82-90
Application Number 220-10 (1) Project cost .....
Received 2-25-82 Filed 3-1-82 Jurisdiction code.....(3)
Fee 50. Date paid 2-25-82 LCP segment .....(4)
Tentative hearing date..... Geo Ref Code .....(5)
X.....(6) Y.....(7)

6/18/81

3. Who should receive written material relevant to the application?

[X] Applicant [X] Representative [X] Both

4. *Conflict of Interest.* All applicants for the development must complete Appendix A, the declaration of campaign contributions.

SECTION II. PROPOSED DEVELOPMENT

Please answer ALL questions. Where questions do not apply to your project (for instance, project height for a land division), indicate "Not Applicable" or "N.A."

1. *Project Location.* Include street address, city, and/or county. If there is no street address, include other description such as nearest cross streets.

3822 W. Pacific Coast Hwy.
number (8) street (9)

Ventura Ventura
city (10) county (11)

Assessor's Parcel Number 060-380-160/778

2. Describe the proposed development. Include secondary improvements such as septic tanks, water wells, roads, etc.

1—family dwelling and attached garage

a) If residential, state:

1) Number of units 1 .....(28)

2) Number of bedrooms per unit.....(28)

3) Type of ownership proposed:
[ ] rental
[ ] condominium
[ ] stock cooperative
[ ] time share
[ ] other .....

b) Number of boat slips, if applicable N/A (29)

c) If land division, number of lots to be created and size .....

3. *Present use of property.*

a) Are there existing structures on the property?
[X] Yes [ ] No

If yes, describe (including number of residential units, occupancy status, monthly rental/lease rates for each unit) and attach rent receipts for the past year.

1 Single family dwelling

b) Will any existing structures be demolished?
[X] Yes [ ] No

Will any existing structures be removed?
[ ] Yes [X] No

If yes to either question, describe the type of development to be demolished or removed, including the relocation site, if applicable.

.....

..... (31)

4. Estimated cost of development (not including cost of land) $100,00 ..... (32)

5. Has any application for a development on this site been submitted previously to the California Coastal Zone Conservation Commission or the Coastal Commission? [ ] Yes [X] No
If yes, state previous application number .....

6. Project height: Maximum height of structure 25 ft
Maximum height of structure as measured from centerline of frontage road.....ft

7. Total number of floors in structure, including subterranean floors, lofts, and mezzanines 2

8. Gross floor area including covered parking and accessory buildings..... sq ft
Gross floor area excluding parking ..... sq ft

9. Lot area (within property lines) .....sq ft or acres

Lot coverages:	*Existing*	*New proposed*	*Total*
Building coverage	.....sq ft	.....sq ft	.....sq ft
Paved area	.....sq ft	.....sq ft	.....sq ft
Landscaped area	.....sq ft	.....sq ft	.....sq ft
Unimproved area	.....sq ft	.....sq ft	.....sq ft

10. Parking: number of spaces existing —
number of new spaces proposed 2
Total 2

no. of cover spaces.....
no. of uncovered spaces.....
no. of standard spaces..... size.....
no. of compact spaces.....size.....

Is tandem parking existing and/or proposed? [ ] Yes [ ] No

If yes, how many tandem sets?..... size.....

11 Are utility extensions for the following needed to serve the project?

a) water [ ] Yes [X] No

b) gas [ ] Yes [X] No

c) electric [ ] Yes [X] No

d) sewer [ ] Yes [X] No

e) telephone [ ] Yes [X] No

If yes to any of the above, would extensions be above ground? [ ] Yes [X] No

SECTION III. ADDITIONAL INFORMATION

The relationship of the development to the applicable items below must be explained fully. Attach additional sheets if necessary.

1. If the development is between the first public road and the sea, is public access to the shoreline and along the coast currently available near the site?
[X] Yes [ ] No If yes, indicate the location of the nearby access, including the distance from the project site.

Faria Beach Park, the cove

2. Is any grading proposed? [ ] Yes [X] No If yes, complete the following.

a) amount of cut .....cu yds
b) amount of fill .....cu yds
c) maximum height of fill slope .....ft
d) maximum height of cut slope .....ft
e) amount of import or export .....cu yds
f) location of borrow or disposal site .....

Grading and drainage plans must be included with this application. In certain areas, and engineering geology report must also be included. See Section V, paragraph 11 for the specifics of these requirements.

3. Does the development involve diking, filling, dredging or placing structures in open coastal waters, wetlands, estuaries, or lakes?

a) diking
[ ] Yes [X] No

b) filling
[ ] Yes [X] No

c) dredging
[ ] Yes [X] No

d) placement of structures
[ ] Yes [X] No

Amount of material to be dredged or filled.....cu yds.
Location of dredged material disposal site .....
Has a U.S. Army Corps of Engineers permit been applied for? [ ] Yes [X] No

4. Will the development extend onto or adjoin any beach, tidelands, submerged lands or public trust lands?
[ ] Yes [X] No

For projects on State-owned lands, additional information may be required as set forth in Section V, paragraph 10.

5. Will the development protect existing lower-cost visitor and recreational facilities? [ ] Yes [X] No
Will the development provide public or private recreational opportunities? [ ] Yes [X] No
If yes, explain .....

6. Will the proposed development convert land currently or previously used for agriculture to another use?
[ ] Yes [ ] No

If yes, how many acres will be converted?.....acres.

7. Is the proposed development in or near:

a) sensitive habitat areas [ ] Yes [X] No
(biological survey may be required)

b) 100-year floodplain [ ] Yes [X] No
(hydrologic mapping may be required)

c) park or recreation area [ ] Yes [X] No

8. Is the proposed development visible from:

a) US Highway 1 or other scenic route [X] Yes [ ] No

b) park, beach, or recreation area [X] Yes [ ] No

c) harbor area [ ] Yes [X] No

9. Does the site contain any:

a) historic resources [ ] Yes [X] No

b) archaeological resources [ ] Yes [X] No

c) paleontological resources [ ] Yes [X] No

If yes to any of the above, please explain on an attached sheet.

10. Where a stream or spring is to be diverted, provide the following information:

Estimated streamflow or spring yield .....gpm
If well is being used, existing yield .....gpm

If water source is on adjacent property, attach Division of Water Rights approval and property owner's approval.

SECTION IV. OTHER GOVERNMENTAL REQUIREMENTS

The *Local Agency Review Form,* Appendix B, must be completed and signed by the local government in whose jurisdiction the project site is located. The completed and signed form must be submitted with this application for the application to be considered complete.

SECTION V. ADDITIONAL ATTACHMENTS

The following items must be submitted with this form as part of the application.

[ ] 1. Proof of the applicant's legal interest in the property. (A copy of any of the following will be acceptable: current tax bill, recorded deed, *signed Offer to Purchase along with a receipt of deposit,* signed final escrow document, or current policy of title insurance. Preliminary title reports will not be accepted.)

[ ] 2. Assessor's parcel map(s) showing the applicant's property and all other properties within 100 feet (excluding roads) of the property lines of the project site. (Available from the County Assessor)

[ ] 3. Copies of required local approvals for the proposed project, including zoning variances, use permits, etc., as noted on Local Agency Review Form, Appendix B.

[ ] 4. Stamped envelopes addressed to each property owner and occupant of property situated within 100 feet of the property lines of the project site (excluding roads), along with a list containing the names, addresses and assessor's parcel numbers of same. The envelopes must be plain (i.e., no return address), and regular business size (9½''x4 1/8''). Include first class postage on each one. Use Appendix C, attached, for the listing of names and addresses. (Alternate notice provisions may be employed at the discretion of the District Director under extraordinary circumstances. See Appendix D).

[ ] 5. Stamped, addressed envelopes and a list of names and addresses of all other parties known to the applicant to have an interest in the proposed development (such as persons expressing interest at a local government hearing, etc.).

[ ] 6. Development location and vicinity maps. Maps should show precisely where the development is proposed and present land and water uses in the project vicinity. U.S. Geological Survey 7½ minute series quadrange map, Thomas Brothers map, road map or area maps prepared by local governments may provide a suitable base map.

[ ] 7. Copy(s) of project plans, drawn to scale, including site plans, floor plans, elevations, grading

and drainage plans, landscape plans, and septic system plans. Trees to be removed must be marked on the site plan. In addition, a reduced site plan, 8½" x 11" in size, must be submitted. Reduced copies of complete project plans will be required for large projects.

[ ] 8. Where septic systems are proposed, evidence of County approval or Regional Water Quality Control Board approval. Where water wells are proposed, evidence of County review and approval.

N/A 9. A copy of any Final Negative Declaration, Final Environmental Impact Report (FEIR) or Final Environmental Impact Statement (FEIS) prepared for the project. Comments of all reviewing agencies and responses to comments must be included.

[ ] 10. Verification of all other permits, permissions or approvals applied for or granted by public agencies (e.g., Dept. of Fish and Game, State Lands Commission, U.S. Army Corps of Engineers, U.S. Coast Guard).

N/A 11. For development on a bluff face, bluff top, or in any area of high geologic risk, a comprehensive, site-specific geology and soils report (including two copies of maps) prepared in accordance with the Coastal Commission's Interpretive Guidelines. Copies of the guidelines are available from the District Office.

SECTION VI. NOTICE TO APPLICANTS

Under certain circumstances, additional material may be required prior to issuance of a coastal development permit. For example, where offers of access or open space dedication, or participation in a controlled housing program are required, preliminary title reports, land surveys, legal descriptions, subordination agreements, and other

outside agreements will be required prior to issuance of the permit.

SECTION VII. AUTHORIZATION OF AGENT

I hereby authorize William H. Langlois to act as my representative and to bind me in all matters concerning this application.

FARIA BEACH TRUST
by /s/ Frank E. Orr Trustee
by /s/ Robert Mobley Trustee
by /s/Elizabeth Blanchard, Trustee

/s/ Marilyn H. Nollan
/s/ James Patrick Nollan
Signature of Applicant(s)

SECTION VIII. CERTIFICATION

1. I hereby certify that I, or my authorized representative, will complete and post the Notice of Pending Permit card in a conspicuous place on the property within 3 days of receipt of the card and notification of filing of this application.
2. I hereby certify that I have read this completed application and that, to the best of my knowledge, the information in this application and all attached appendices and exhibits is complete and correct. I understand that any misstatement or omission of the requested information or of any information subsequently requested shall be grounds for denying the permit, for suspending or revoking a permit issued on the basis of these or subsequent representations, or for seeking of such further relief as may seem proper to the Commission.
3. I hereby authorize representatives of the California Coastal Commission to conduct site inspections on my property. Unless arranged otherwise, these site inspections shall take place between the hours of 8:00 am and 5:00 pm.

/s/ Marilyn H. Nollan
/s/ James Patrick Nollan
Signature of Authorized Agent
or Applicant(s)

APPLICATION FOR COASTAL DEVELOPMENT PERMIT

APPENDIX A

DECLARATION OF CAMPAIGN CONTRIBUTIONS

The Coastal Commission's conflict of interest regulations prohibit any commissioner voting on a project if he or she has received campaign contributions in excess of $100 within the past year from project proponents or opponents, their agents, employees or family, or any person with a financial interest in the project.

In the event of such contributions, a commissioner must disqualify him or herself from voting on the project; failure to do so may lead to revocation of the permit.

Each applicant must declare below whether any such contributions have been made to any of the commissioners *or alternates* listed on the reverse.

CHECK ONE

[X] The applicants, their agents, employees, family and any person with a financial interest in the project *HAVE NOT CONTRIBUTED* over $100 to any commissioner within the past year.

[ ] The applicants, their agents, employees, and/or family, and/or any person having a financial interest in the project *HAVE CONTRIBUTED* over $100 to the commissioner(s) listed below within the past year.

Commissioner .....
Commissioner .....
Commissioner .....

/s/ Marilyn H. Nollan
/s/ James Patrick Nollan — 2-12-82
signature of applicant or authorized agent — date

Please print your name Marilyn H. Nollan, James P. Nollan

FARIA BEACH TRUST
by /s/ Frank E. Orr Trustee
by /s/ Robert Mobley Trustee

JAMES PATRICK NOLLAN
MARILYN HARVEY NOLLAN
407 South Mansfield Avenue
Los Angeles, California 90036
Phone: (213) 936 3972 (Home)
(213) 485 4232 (Work)

CALIFORNIA COASTAL COMMISSION

JAMES PATRICK NOLLAN)
MARILYN HARVEY NOLLAN)
Applicants)

APPLICATION NO. 4-82-90 OBJECTION TO SPECIAL CONDITIONS REQUIRING LATERAL ACCESS BY DEED RESTRICTION AND WAIVER OF PUBLIC LIABILITY ASSOCIATED THEREWITH

Date: April 1, 1982
Time: 9:00 a.m.
Place: California Coastal Commission
South Central Coastal District
Balboa Bldg. Suite 616
735 State Street
Santa Barbara, Calif.

I.

PRELIMINARY STATEMENT

Applicants, James P. Nollan and Marilyn H. Nollan, have applied for a California Coastal Commission permit to demolish an existing single family dwelling and construct a new single family dwelling in its place. The property in question is that described in the above referenced application. The applicants are lessees of the subject property and beneficiaries of the Faria Family Trust with regard thereto.

The existing structure is a single family residence, single story, with no garage. It has four bunk beds and one double bed. Utilities are established and service the site. Waste disposal is by septic tank and leach line. Parking is available for two cars on the portion of the lot not covered by the house. A fence separates the property on the highway side from the highway. A beach wall with rocks in place on the ocean side protects the structure from the ocean. The property extends beyond the beach wall into the ocean as indicated in the architectural drawings accompanying the permit application.

A new sewer system is being constructed and will serve the applicant's residence. A "will serve" letter has been issued for the property. The use of septic tanks and leach lines will be discontinued. The proposed new structure, depicted in the architectural drawings submitted with the application, will be two story and include a two car garage. The new structure will be energy efficient complying with all federal, state and local requirements pertaining to energy conservation. The new structure will have one master bedroom for the applicants and two smaller bedrooms: one for each of the applicant's children. The structure is incapable of use as a multi family dwelling.

Based upon the above, the California Coastal Commission, South Central Coast District, in its document entitled "Project Information" made the preliminary findings (hereinafter "Findings") as set forth in Exhibit A attached hereto.

With the Findings we disagree.

I.

THE FINDINGS THAT PUBLIC ACCESS WILL BE AFFECTED BY INCREASING THE INTENSITY OF USE OF THE SITE IS NOT SUPPORTED BY THE FACTS (Paragraph I of Findings)

In the recent case of *Pacific Legal Foundation v. California Coastal Commission,* (February 24. 1982) 129 Cal.App.3d 44, (a copy of which is attached hereto as Exhibit B) the Court of Appeals examined the access requirements imposed by the California Coastal Act of 1976 (Public Resources Code Sections 30000 et seq.) and compared them with the guidelines promulgated by the Coastal Commission to implement said access requirements. The Court concluded that intensification of use does not of itself affect public access, but rather, the issue to be addressed is the relationship between the development and public access.

> "At the threshold the [Coastal Commission's] regulations provide that 'All new development resulting in any intensification of land use generates sufficient burdens on public access to require access conditions in conjunction with that development.' (Public Access Guidelines, pt. II(B) at 5. . .) That is an unwarranted extension of the language of the Act and a rejection of any need for determining the relationship between the development and public access. It is so broad that it could include many types of development which would have nothing to do with access. 'Intensification of use' does not necessarily impede existing access nor does it necessarily create a need for addition access. For example, an addition of a bedroom

> to a family dwelling to accommodate a new baby would intensify the land use and might increase the size of a house by more than 10 percent so as to qualify as 'new development,' but it could hardly be said to burden public access to the beach or create a need for additional public access." *Pacific Legal Foundation v. California Coastal Commission, supra,* page 51.

Any relationship between public access and the proposed demolition of the existing single family dwelling and construction of a new single family dwelling described in the application herein is tenuous at best. Currently the public is not entitled to use the existing lot, structure or parking area. The new structure will house the applicants more comfortably, but will not increase the number of dwelling units. The public will not have any greater or lesser use of the lot after construction. The above facts certainly do not support any conclusion that public access is affected. And just as the Court concluded in *Pacific Legal Foundation, supra,* such demolition and construction "could hardly be said to burden public access to the beach or create a need for additional public access."

II.

THE FINDINGS THAT "SUCH PRIVATE DEVELOPMENT IMPOSES AN IMPEDIMENT TO OR BURDEN ON THE PUBLIC'S ABILITY TO GAIN ACCESS TO OR ALONG THE SHORELINE. . ." IS NOT SUPPORTED BY THE FACTS (Paragraph 2 of Findings)

Pacific Legal Foundation, supra, held that the relationship between the particular proposed development and

public access must be examined and that general policies or statements concerning development and access could not support a requirement of land dedication for access by an applicant for a construction permit. *Pacific Legal Foundation, supra,* at pages 52-53.

Paragraph two of the Findings gives three reasons for requiring applicants herein to dedicate by deed restriction lateral access to the public: none of the reason stated are meritorious. The first reason listed in paragraph two of the Findings as justification for requiring applicants to give lateral access as a condition to issuing the permit requested herein has been specifically struck down by the courts as improper and beyond the jurisdiction of the California Coastal Commission. The Findings state at paragraph 2, page one:

> "Such private development imposes an impediment to or burden on the public's ability to gain access to or along the shoreline either incrementally or cumulatively in the following ways: 1) discouraging the public from visiting the shoreline because of the physical proximity of development . . ."

The Court in *Pacific Legal Foundation v. California Coastal Commission, supra,* denounced similar if not precisely the same findings as follows:

> "Finally the Commission's unconcealed bias against the constitutionally protected right of private property is reflected in the regulations as follows: 'Private development imposes an impediment to or burden on the public's ability to gain access to or along the shoreline, either incrementally or cumulatively in

> the following ways: . . . *discourages them from visiting the shoreline in the first place because of physical proximity of development;* . . . creates use conflicts in which landowners harass and intimidate the public and seek to prevent them from using tidelands. . . .
>
> "Rarely, if ever, have we had occasion to note such an overt manifestation of bias and the use of such pejorative language in the offical writings of an agency of the State of California. By that statement the Commission has simply declared that the very existence of privately owned residences along the shore line is an anathema to the public interest and has cast the private property owner in the role of the "heavy" in every scenario. The regulation is in direct contradiction with the spirit of Public Resources Code Section 30001, subdivision (d) and the stated legislative policy." *Pacific Legal Foundation, supra,* page 53.

Therefore, under the authority of *Pacific Legal Foundation, supra,* reason number one, paragraph two of the Findings, given to support the Commission's contention requiring the applicant to dedicate lateral access by deed restriction as a condition precedent to granting the permit herein must fail.

The second reason, paragraph two of the Findings, advanced by the Commission for requiring applicants to dedicate lateral access states:

> "Such private development imposes an impediment to or burden on the public's ability to gain access to or along the shoreline either incrementally or cumulatively in the following ways . . . 2) consuming

existing road capacity and off-street parking and thereby making it more difficult to gain access to the Coast by further congesting existing access roads and recreational areas . . . ''

There are no facts to support the above conclusion. The new structure will not consume any additional road capacity. (See architectural plans attached to application.) The new structure, like the existing structure, will be limited to the applicants' private property. Off-street parking, therefore, will remain the same for the applicants and the public. The parking capacity for the old and new dwellings is the same. The new dwelling, however, will contain a covered garage which will conceal the automobiles from the highway. How the proposed construction consumes ''off-street'' parking is mysterious. If the implication of the findings is that increased dwelling size prohibits the public from parking on the unused portion of the applicants' lot, the Findings are outrageous. Such a conclusion rests on the presumption that private ownership of coastal property is unjustified, a conclusion contrary to the Coastal Act (Public Resources Code Sections 30000 et seq.) and the express holding of *Pacific Legal Foundation, supra.* The second reason given in paragraph two must fail as being contrary to the applicable law and the facts relevant to this particular permit application.

Reason three given in paragraph two for requiring lateral access is as follows:

> ''Such private development imposes an impediment to or burden on the public's ability to gain access to or along the shoreline either incrementally or cumulatively in the following ways . . . 3) increasing the use of the beach by residents and guests.'' Findings, paragraph 2, page one.

It is unclear how this conclusion was reached and/or what it means. How will a new home increase use of the breach by the applicants? Certainly even if the applicants chose to avail themselves of the beach on a more frequent basis with or without a new dwelling, such use would not affect public access to the tidelands. And most importantly an increase in time spent by applicants on their private beach property cannot justify the State in taking away the applicants property or justify the State's requiring the applicant to give by deed restriction lateral access to the public.

The reference to guests in reason three of the Findings is specious at best. If the implication is that because the applicants will have a new dwelling they will therefore have more guests, the question still remains would this affect public access? As planned, the new structure will have fewer beds than the existing dwelling. Consequently if the cited finding is pertinent, which we contend if isn't, then it would support applicants' position that public access is not affected adversely and no dedication by deed restriction is justified as a condition to granting the permit sought herein.

Most importantly reason three of the Findings appears to be merely another manifestation by the Commission that private ownership of beach property is to be eliminated. The California Constitution (Article X, Section 1), the California Coastal Action of 1976, and *Pacific Legal Foundation, supra,* hold to the contrary.

The legal precedent is contrary to paragraph two of the Findings. Also the facts as discussed, *supra,* are contrary to paragraph two of the Findings. Therefore the

conclusion in paragraph two that the proposed demolition and construction of applicants' house adversely affects public access and requires dedication of lateral access is without merit and should be disregarded.

III.

ADEQUATE PUBLIC ACCESS EXISTS NEARBY TO APPLICANTS' LAND THEREBY NEGATING ANY JUSTIFICATION FOR IMPOSING ACCESS REQUIREMENTS AS A CONDITION PRECEDENT TO ISSUING THE PERMIT SOUGHT HEREIN

The California Coastal Act of 1976 provides that no access conditions shall be imposed on an applicant where adequate nearby access exists.

> "Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects *except* where . . . adequate access exists nearby . . . " Public resources Code Section 30212.

Lateral and vertical access exists at nearby Faria County Park which was donated to the public by the predecessors in interest in the land held by the Faria Beach Trust. Applicants are beneficiaries of the Faria Beach Trust. Lateral access exists on the public property located beyond the property line on the ocean side of all the land adjacent to that of the applicants. At low tide, the public property beyond the beach side boundary of Applicants' property is exposed so as to provide public lateral access on public property located laterally on the oceanside of the

property lines of applicants property and the private property adjacent thereto. These tidelands are easily reached from the aforementioned Faria County Park.

CONCLUSION

As *Pacific Legal Foundation, supra,* has so dramatically stated, the constitutional right of private property ownership has not been revoked by the California Coastal Act nor will it be revoked by the California Coastal Commission. The decision of *Pacific Legal Foundation, supra,* is binding on this Commission and must be followed. *Auto Equity Sales, Inc., v. Superior Court,* (1962) 57 Cal.2d 450.

The attempts by the Commission to justify requiring the applicants herein to dedicate by deed restriction lateral access to the public as a condition precedent to granting the permit sought cannot be and has not been supported by the facts. Unless the Commission chooses to ignore legal, binding precedent established by *stare decisis,* it must grant the permit sought herein without any requirement that the applicants give public access as a condition thereto.

DATED: March 31, 1982

/s/ James Patrick Nollan
/s/ Marilyn Harvery Nollan

WM. H. LANGLOIS, ARCHITECT
Architecture and Planning
1451 East Main Street • Ventura, California 93003
Telephone (805) 648-3196

California Coastal Commission
South Central Coast District
735 State Street
Balboa Building, Suite 612
Santa Barbara, California 93101

Please attach this to the application submitted by James P. and Marilyn Nollan and the Faria Beach Trust.

8. Gross floor area including covered parking and accessory buildings, 2464 sq ft.

   Gross floor area excluding parking, 1993 sq ft.

9. Lot area (within property lines), 2800 sq ft.

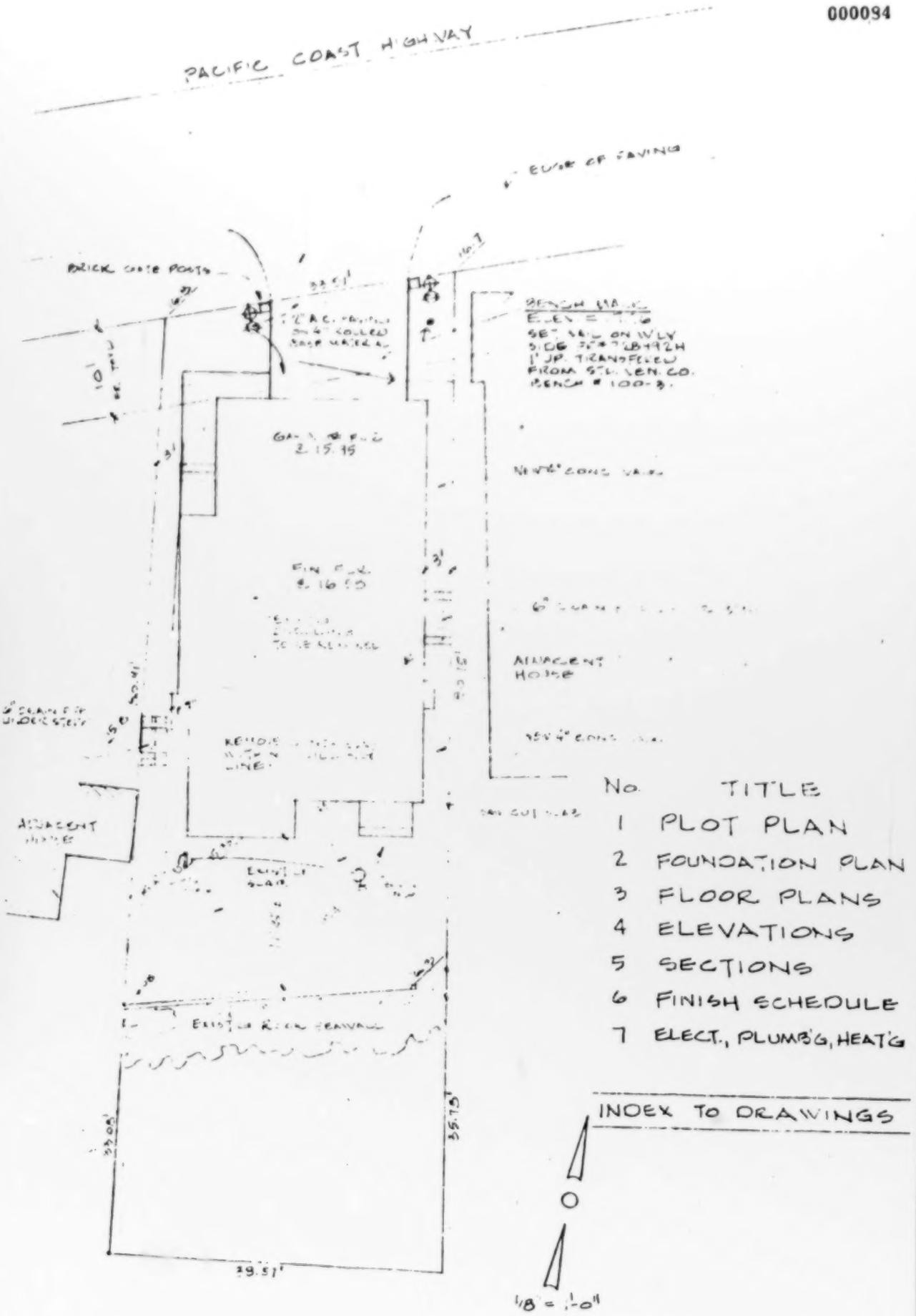
Lot coverages:	Existing	New Proposed	Total
Building coverage	521 sq ft	1236 sq ft	1236 sq ft
Paved area	1152 sq ft	1168 sq ft	1168 sq ft
Landscape area	150 sq ft	396 sq ft	396 sq ft
Unimproved area	977 sq ft	0 sq ft	0 sq ft

(Received March 1, 1982)

OVERSIZE FOLDOUT(S) FOUND HERE IN THE PRINTED EDITION OF THIS VOLUME ARE FOUND FOLLOWING THE LAST PAGE OF TEXT IN THIS MICROFICHE EDITION.

SEE FOLDOUT NO 1-2

000094



NOTE: EXISTING PALMS TO REMAIN

PLOT PLAN

Mark Lowell 2-16-82
Ventura County Planning Department

WM. H. LANGLOIS, ARCHITECT
ARCHITECTURE AND PLANNING

PLOT PLAN & SPECIFICATIONS

2-16-82

BEACH HOME
MR. & MRS. PAT NOLLAN
3822 PACIFIC COAST HIGHWAY

BEST AVAILABLE COPY

ADMINISTRATIVE PERMIT APPLICATIONS. Report on administrative permits approved by the Executive Director of the Commission. If four or more Commissioners vote to remove an item from this calendar, the approval is revoked and the item will be scheduled for hearing and voting at a later meeting.

(See agenda items listed on pages 4 and 5 of the agenda, a. through t. inclusive)

heard at the California Coastal Commission meeting held at the Eureka Inn, 7th & F Street, Eureka, California, on Wednesday, April 7, 1982.

REPORTED BY:

Helena Ellioff, RPR
4 Anchor Drive #422
Emeryville, CA 94608
(415) 654-6794

[1]

ACTING CHAIRMAN NUTTER: Thank you for getting us through Central Coast. We'll now turn to Jan Tulk who will take us through South Central.

ASSISTANT DEPUTY DIRECTOR TULK: A summary of the comments of the pre-Commission meeting have been distributed to the Commission along with a packet of correspondence relating to permits pending before you today. I will highlight those comments as we go through the administrative permit applications.

In terms of the administrative permit calendar, there were two separate sets of comments specifically received at the pre-Commission workshop, the first dealt with item h. the Nollan application. You have also received a fairly extensive letter from the Nollans regarding the condition

suggested by the staff requiring dedication of public access via a deed restriction along their property within the Faria subdivision.

The applicants contend that based on the Pacific Legal Foundation Court of Appeals decision that the Commission should no longer be requiring public access in these types of situations. As the staff has noted previously to the Commission, because that decision is currently on appeal before the State Supreme Court and because the Commission has in the past imposed these similar types of conditions for reasons as stated in the staff report, the staff still recommends that the Commission include these conditions in permits on oceanfront developments.

In addition, comments were received on [2] administrative item 4-82-102, which is the Wright application, and the major concern was with drainage problems resulting from continued development of single-family lots in the Los Osos area. The permit conditions included on this administrative item do include some drainage control plans for the site. It is the staff's belief that overall drainage problems for the City and for the County are to be resolved within the Local Coastal Program planning process although concerned citizens have been informed of this process and have indicated they will take their concerns to the County to ensure an overall comprehensive planning for this issue.

That concludes the staff's presentation on the administrative items.

ACTING CHAIRMAN NUTTER: We have no requests to speak on any South Central items. I'm wondering whether we have any reason to believe that there are

people in the same fix that our Chair is in. As I reported earlier, there was a transportation problem.

ASSISTANT DEPUTY DIRECTOR TULK: That may, in fact, be the case. I was under the impression that there would be a representative at least from the Hearst Corporation which is on the Consent Calendar.

ACTING CHAIRMAN NUTTER: And knowing what sometimes happens, what I'd like to do is simply put all of these items on the table and move along, rather than having to back track and undo some possible action.

EXECUTIVE DIRECTOR FISCHER: I would concur, Mr. Chairman. We have received no notification from any [3] of the applicants, but I see someone approaching the microphone, Mr. Chairman.

ACTING CHAIRMAN NUTTER: Well, we're sorting things out and I hadn't yet come to item ten, and I see we do have a representative from the Hearst Corporation, but he came from Los Angeles, so he may not have had the same problem that others do.

Was there any indication that on item nine h. there would be someone here, Ms. Tulk?

ASSISTANT DEPUTY DIRECTOR TULK: We did not have any assurance that anyone would or wouldn't come, just a letter from them.

ACTING CHAIRMAN NUTTER: Well, under those circumstances, let me back track and suggest that we proceed with the administrative permit items and ask whether there are any Commissioners who have concerns or questions on those items from South Central.

If not, subject to somebody showing up later, those permits will issue at the conclusion of the session.

In connection with the Consent Calendar. Ms. Tulk.

(At which time, the Consent Calendar was discussed and voted on)

ADMINISTRATIVE PERMIT
NUMBER 4-82-90

EXECUTIVE DIRECTOR DETERMINATION

DATE: April 7, 1982

APPLICANT: James P. and Marlyn H. Nollan
407 South Mansfield
Los Angeles, California 93030

Faria Beach Trust
P.O. Box 1178
Ventura, California 93002

LOCATION: 3822 West Pacific Coast Highway
Faria Beach
County of Ventura, (APN 060-380-160)

1. Project Approved:
   Demolish existing single family dwelling; construct two-story single family dwelling on ocean-front lot.

2. Terms and Conditions:
   STANDARD CONDITIONS: (See Exhibit A, attached)

   SPECIAL CONDITIONS:
   See the attached.

3. The Executive Director has determined that the project described above and as further described in the application numbered (see reverse) as subject to the terms and conditions of Paragraph 2 conforms to the criteria for an Administrative Permit set forth in Public Resources Code Section 30624 and rules and regulations enected pursuant thereto.

4. The determinations set forth in Paragraph 3 are based upon information contained in the application and any other facts relating to this project obtained by the Executive Director and set forward in the District Office files. Such facts are incorporated herein by reference.

5. Public Resources Code Section 30624 provides that if any two members of the California Coastal Commission so request at the first meeting following the issuance of this permit, the issuance shall not be effective and instead the application shall be set for a public hearing pursuant to the regular Commission permit procedures. You will be notified if this occurs.

California Coastal Commission
SOUTH CENTRAL COAST DISTRICT
735 State Street, (805) 963-6871
Balboa Building, Suite 612
Santa Barbara, CA 93101

PERMIT NO. 4-82-90

Pursuant to Public Resources Code Section 30604 and following, and provisions of the California Administrative Code enacted pursuant thereto, a permit is hereby issued to perform the development described in the Permit Application.

This permit is subject to the terms and conditions of the Commission resolution or Executive Director determination approving this project and any other requirements which are set forth on the reverse of the Permit and incorporated herein by reference.

The Project shall be commenced within 2 years of the issuance date of this permit.

Failure of Permittee to conform to the provisions of this Permit shall subject him to penalties.

This Permit is not intended to, nor shall it be interpreted to have any effects on rights and obligations under private contracts or agreements, nor is it intended to take the place of any permit to be issued by any other public body.

This Permit is assignable upon assumption of the Permittee's obligations by the Assignee as provided for by regulation.

This Permit shall not be valid until a copy of the Permit signed by all Permittees in the space provided below is returned to the District Office.

IMPORTANT: THIS PERMIT IS NOT VALID UNLESS AND UNTIL A COPY OF THE PERMIT WITH THE SIGNED ACKNOWLEDGEMENT HAS BEEN RETURNED TO THE COMMISSION OFFICE.

Michael L. Fisher
Executive Director
California Coastal Commission

by: /s/ James M. Ryerson
District Director

I/WE ACKNOWLEDGE THAT I/WE HAVE RECEIVED A COPY OF THIS PERMIT, HAVE READ IT, AND UNDERSTAND ITS CONTENTS.

.....

.....

EXHIBIT A

STANDARD CONDITIONS:

1. *Notice of Receipt and Acknowledgement.* The permit is not valid and construction shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. *Expiration.* If construction has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Construction shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. *Compliance.* All construction must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions

set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.

4. *Interpretation.* Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

5. *Inspections.* The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.

6. *Assignment.* The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

7. *Terms and Conditions Run with the Land.* These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

SPECIAL CONDITIONS:

Lateral Access

1. Prior to the issuance of the Coastal Development Permit, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution.

Waiver of Public Liability

2. Prior to the issuance of a Coastal Development Permit, the applicants shall submit, to the Executive Director, a deed restriction for recording free of prior liens except for tax liens, that binds the applicants and any successors in interest. Thr form and content

of the deed restriction shall be subject to the review and approval of the Executive Director. The deed restriction shall provide (a) that the applicants understand that the site is subject to extraordinary hazard from waves during storms and the applicants assume the liability from those hazards; (b) the applicants unconditionally waive any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; and (c) the applicants may make them ineligible for public disaster funds or loans for repair, replacement, or rehabilitation of the property in the event of storms.

Public Rights

3. The applicants shall, by accepting the terms and conditions of the permit, agree that issuance of their permit and completion of the authorized development shall not prejudice any subsequent assertion of public rights, i.e., prescriptive rights, public trust, etc.

MB/ms

SUPERIOR COURT OF THE
STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

NO. SP 50805

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

STATEMENT OF DECISION

(Filed January 18, 1983)

Petitioners' Petition for Writ of Administrative Mandamus will be GRANTED as set forth below:

The real property which is the subject of this litigation is located along the coast of California in Ventura County. As lessees and present purchasers of the property, petitioners have a fundamental, vested interest in the property and the right to seek relief from arbitrary governmental action affecting the property or their use of it.

Petitioners applied to the California Coastal Commission (Commission or respondent) for a permit to demolish an existing substandard single-family residence on a lot and replace it with a larger single-family residence.

As lessees (with a purchase option) of the property on which the old structure is presently located, petitioners have standing to challenge any governmental decision which threatens those property interests. Petitioners' permit application was reviewed by the executive director of

the Commission under the administrative permit procedures set forth in section 30624 of the Public Resources and sections 13150-13153 of Title 14 of the California Administrative Code.

Under the authority granted to him by those provisions of law the executive director approved petitioners' permit application subject to a condition which required them to record a deed restriction allowing the public the right to pass and repass on the sandy beach seaward of the seawall located on their leased property and dedicate the entire beach, approximately one-third of the property. The public access and dedication conditions are not justified by the generalized findings or the evidence in the record.

Under the administrative permit procedures of the Commission, an applicant has a right to request that the Commission not allow the executive director's decision to stand but rather to set the matter for a full public hearing under the regular permit procedures of the Coastal Act.

Petitioners made such a request to the Commission in writing. Their grounds for requesting such action from the Commission were that such a condition could only be imposed subsequent to an evidentiary hearing at which their project was shown to have a direct adverse impact on public access to the sea and that even if such evidence could be produced an access condition could not be imposed on their project because of the existence of adequate lateral access nearby in the form of a county park.

The Commission declined to set the matter for a full public hearing and the executive director's decision became final.

The Commission may constitutionally require a grant of public access only when the facts in the case before it demonstrate that a proposed development will place a burden on public access to the coast. No such burden is shown by the facts in the administrative record. Petitioners are not building a single-family residence on a vacant lot but rather are replacing a single-family residence with another single-family residence. Petitioners are not changing the use of the property. It does not appear that the replacement home is out of character with the other houses in the area. Although the house that will be built by petitioners is nearly three times as large as the small house now on the property, the record does not show at this time that its placement on existing residential private property will burden the public's otherwise available access to the beach.

In ruling on coastal development permits, the Commission must make a case-by-case analysis of the evidence presented to determine whether a burden has been placed on public access to the coast. A valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access. Such evidentiary showing should either demonstrate immediate impact or verifiable, nonspeculative cumulative impact. Generalized policy statements regarding the cumulative impact of single-family residences being built on vacant lots have no relevance to this case or support in the record.

Though the Legislature intended that the construction of single-family residences on vacant lots be considered new development subject to the access requirements of section 30212, it did not intend that the expansion or enlargement of existing residences be considered

new development absent a showing that they had an individual or cumulative adverse impact on public access to the sea. This is so because the impact of construction on vacant land is fundamentally different from the impact of the enlargement or expansion of any existing use.

Inasmuch as the Legislature intended for the Commission to establish that a project which expands an existing use has an individual or cumulative adverse impact on public access to the sea before finding that it is new development within the meaning of section 30212, it was an abuse of discretion for the Commission to refuse to set petitioners' application for a full public hearing so that an evidentiary record could be established with respect to this issue.

Judgment in accord with this decision will be entered ordering a peremptory writ of mandamus to issue from the Court, directing respondent to hold a public hearing on petitioners' application, make proper evidentiary findings, and take action on Permit No. 4-82-90 in accordance with this decision.

Dated: Jan. 18, 1983

/s/ William L. Peck
Judge of the Superior Court

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF VENTURA

NO. SP 50805

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

JUDGMENT GRANTING PEREMPTORY WRIT OF MANDAMUS

(Filed January 18, 1983)

This matter came regularly before this Court on December 16, 1982, for hearing, the Honorable William L. Peck presiding. Jo Lynn Lambert appeared as attorney for petitioners and Peter H. Kaufman. Deputy Attorney General, appeared as attorney for respondent. The record of the administrative proceedings having been received into evidence and examined by the Court, arguments having been presented, both oral and written, and the matter having been submitted for decision,

IT IS ORDERED that:

1. A writ of mandamus shall issue from this Court, remanding the proceedings to respondent and commanding respondent to set aside its decision dated April 7, 1982, in Application No. 4-82 90, and set the matter for a full evidentiary hearing.

2. Petitioners shall recover their costs in this action in the amount of $———.

DATED: Jan. 18, 1983

/s/ William L. Peck
Judge of the Superior Court

Judgment entered on ————, 1983, in the Judgment Book, Volume No. ——, Page ——.

.....
CLERK

By.....
DEPUTY CLERK

CALIFORNIA COASTAL COMMISSION
631 Howard Street, San Francisco 94105—(415) 543-8555

STAFF: NC/JT/PM/ND
HEARING DATE: 6/21-24/83

COURT ORDERED REMAND
STAFF REPORT and RECOMMENDATION
REVISED FINDINGS

APPLICATION NUMBER: 4-82-90

APPLICANT:

James P. and Marilyn H. Nollan
407 South Mansfield
Los Angeles, CA 93030

Faria Beach Trust
P.O. Box 1178
Ventura, CA 93002

PROJECT:

Demolish existing single family dwelling; construct two-story, single-family dwelling on an oceanfront lot.

Lot Area: 2,800 sq. ft.
Building Coverage: 1,236 sq. ft.

Pavement Coverage:	1,168 sq. ft.
Landscape Coverage:	396 sq. ft.
Parking Spaces:	2 (covered)
Zoning:	R-B
Plan Designation:	High Density Residential
Project Density:	16 du/ac
Ht. Abv Fin Grade:	25 feet

SITE:

3822 W. Pacific Coast Highway
Faria Beach
County of Ventura
(APN: 060-380-160)

SUBSTANTIVE FILE DOCUMENTS:

1. Coastal Commission Permit Nos. 4-82-28C, 4-82-262, 4-82-135, 4-82-104, 4-28-29, 4-82-464, 4-81-463 (Demolition and reconstruction of single family residences).
2. South Central Coastal Regional Commission Permit Nos. 217-13, 211-21, 208-34 (Demolitions and reconstruction of single family residences that increased floor area and bulk/recorded deed restrictions).
3. Coastal Commission Appeal Nos. 172-79 and 173-79 and Regional Nos. 203-25 and 203-26 (Faria Family & Basso, Green, Dietrick and Faria Family & Lindsey).
4. Statewide Interpretive Guidelines. May 5, 1981 "Public Access".
5. Regional Commission Nos. 192-09 and 195-33 (Moran and Mobley).
6. *Coastal Zone '80: The San Diego Regional Coastal Access Study,* Dennis Prescott.
7. *Coastal Zone '80: Beach Access Problems Programs and Progress,* David Brower.
8. Santa Monica Draft Land Use Plan, 1980.
9. *Coastal Recreation: A Handbook for Planners and Managers.* Robert B. Ditton and Mark Stephens.

10. *The Cumulative Impacts of Shorezone Development at Lake Tahoe,* Phillips Brandt Reddick, McDonald and Grefe.
11. *Coastal Zone Management Journal—Environmental Resources and Law,* Marc J. Hershman.
12. *Recreational Access to the Coastal Zone,* Sea Grant Marine Advisory Program.
13. Minutes of the April 28, 1979 Regional Commission hearing of Permit Nos. 203-25 and 203-26.
14. Appeal No. 101-79 (Remminga).

DATE OF COMMISSION ACTION:

May 26, 1983 in Santa Barbara

COMMISSIONERS VOTING "YES":

Callahan, Franco, Grossman, King, MacElvaine, McNeil, Shipp, Wornum, Holmdahl and Chairman Nutter

COMMISSIONERS VOTING "NO":

McMurray and McInnis

SUMMARY

The applicants are proposing to demolish a one-story, single-family residence, and to construct a two-story, single-family residence with attached two-car garage. The new development will result in 3 times the lot coverage than that of the previous structure. Staff is recommending the subject development is "new development" and can be approved subject to conditions requiring a lateral access deed restriction, a waiver of public liability deed restriction and an agreement by the applicant that it will not prejudice any subsequent assertion of public rights (i.e., prescriptive rights, public trust).

STAFF NOTE:

This application for the demolition and reconstruction of a single family residence was remanded by the Ventura

County Superior Court which had reviewed the applicant's petition for administrative mandamus. The Commission had approved the application through its administrative permit procedures, subject to a requirement of a lateral access deed restriction. The Court found this action was not supported by substantial evidence in the administrative record, and remanded the matter for Commission hearing and further action consistent with the Statement of Decision, dated January 18, 1983 (Attachment A). The Court's decision indicates that the Commission may require a grant of public access, but only when the facts demonstrate that a proposed development will place a burden on public access to the coast.

The staff recognizes and respects the Court's considered decision. However, after full review of the facts related to this development request, as well as review of literature on public access to the shoreline, including prior permit decisions, interpretive guidelines adopted by the Commission and recreation/access planning documents, the staff believes the Commission should find the replacement and increase in size of residential lot coverage proposed by the applicant would change the intensity of existing private residential use on the subject site. This change in use would create adverse impacts, both individually and cumulatively on the public's ability to visit state tidelands which exist south of the applicant's development site. These adverse impacts on access should be mitigated by public access benefits, consistent with Sections 30210-30214 of the Coastal Act of 1976. In addition, the Commission has a long precedential history of requiring lateral access deed restrictions of new development projects in the subject beach tract which can be determined to adversely impact public access.

In light of the facts of this case, of the results of research regarding the need for and impacts on public recreational and access opportunities, and of the strong constitutional and statutory policies urging maximum public access to the beach, the staff believes the Commission's action on the subject request must reflect the Commission's past and

present policy regarding new development situated between the sea and the first public road. The staff further believes the Court would have reached the same conclusion in viewing the applicant's case, had the administrative record contained the findings proposed in this staff recommendation, and the information and analysis upon which they rest. For these reasons, the staff recommends the Commission approve the development request subject to a condition requiring a lateral access deed restriction to be recorded by the applicants.

The Commission staff asked the State Lands Commission staff for information regarding the boundary between public and private lands on the project site because preliminary research indicates the residence may be located seaward of the mean high tide line. (See, e.g. Attachment B). The shoreline photographed in Attachment B is not the shoreline in front of the applicants' site. The shoreline is north of the Faria Beach Tract nearer to Rincon, and is offered as an informational tool to demonstrate that the historic location of the mean high tide line along the Ventura County coast has changed substantially in some instances. As of this writing the study is not complete. Therefore, the findings proposed in this staff recommendation are based on the policies of Chapter 3 of the Coastal Act without regard to the possibility that the applicant is proposing development on public land.

STAFF RECOMMENDATION

The staff recommends the Commission adopt the following resolution:

I. APPROVAL WITH CONDITIONS

The Commission hereby *grants* a permit for the proposed development subject to the conditions below, on the grounds that, as conditioned the development will be in conformity with the provisions of Chapter 3 of the California Coastal Act of 1976, will not prejudice the ability of the local government having jurisdiction over the area to prepare a Local Coastal Program conforming to the provisions of Chapter 3 of the Coastal Act, is located between

the sea and the first public road nearest the shoreline, is in conformance with the public access and public recreation policies of Chapter 3 of the Coastal Act and will not have any significant adverse impacts on the environment within the meaning of the California Environmental Quality Act.

II. CONDITIONS

This permit is subject to the following conditions:

STANDARD CONDITIONS: (See Exhibit A)

SPECIAL CONDITIONS:

1. Prior to the transmittal of a permit, the applicant shall record, free of prior liens except tax liens, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject property in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution.

Waiver of Public Liability

2. Prior to the transmittal of a permit, the applicant shall submit to the Executive Director a deed restriction, for recording free of prior liens except for tax liens, that binds the applicants and any successors in interest. The form and content of the deed restriction shall be subject to the review and approval of the Executive Director. The deed restriction shall provide (a) that the applicants understand that the site is subject to extraordinary hazard from waves during storms and the applicants assume the liability from those hazards; (b) the applicants unconditionally waive any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; and (c) the applicants understand that construction in the face of these known hazards may make them ineligible for public disaster funds or loans

for repair, replacement, or rehabilitation of the property in the event of storms.

Public Rights

3. The applicant shall, by accepting the terms and conditions of the permit, agree that issuance of the permit and completion of the authorized development shall not prejudice any subsequent assertion of public rights, (i.e., prescriptive rights, public trust, etc.)

III. FINDINGS AND DECLARATIONS

The Commission finds and declares as follows:

A. *Project Description/Permit History.* The applicant proposes to demolish an existing 521 sq. ft., one-story, single-family residence and to construct a two-story, single-family residence (1,674 sq. ft. of liveable space) with attached two-car garage. The proposed development would result in 2,464 sq. ft. of lot coverage by the new enlarged residence and accessory residential structures. There is an existing rock seawall in front of the residence on its southern border. No construction would occur on the existing seawall, although the proposed development would move residential structures further seaward toward the existing seawall (Exhibits 1, 2 and 3).

The proposed project is located in the Faria Beach area of Ventura County where the Commission has granted several coastal development permits for demolitions and constructions of new, larger residential structures and/or shoreline protective devices. The Faria Beach Tract contains 138 lots which have been leased for various terms and conditions. The Faria family has divested its interest in the land and sold the beach front tract to the Faria Beach Trust, which is comprised of lessees and homeowner association members. Each lessee has been given the option to purchase his/her respective leased lot. The lessees were also given specified time limits to bring remedy violations of the building code standards. The applicants' project site is Lot No. 59 in the subject beach tract. The Faria Beach Trust is the record owner of the Faria Rincon Beach

Colony of Ventura, and the Nollans own Lot 59 as trustors and beneficiaries under a Trust Agreement dated May 27, 1983. The South Central Coastal Regional Commission and the State Commission have considered approximately 60 coastal development permit requests in the Faria Family Beach Tract. Approximately 43 of the permit requests were approved subject to conditions requiring deed restricted provisions for lateral access along the shoreline. Fourteen permit requests were processed prior to changes in the Commission's Administrative Regulations pertaining to joint application of owner and lessee. The remaining permits were for development situated on inland, not shorefront lots within the tract, which contains a total of 138 leased lots.

The Commission's use of a condition requiring deed restricted lateral access in the Faria Tract dates from June 19, 1979 when the Commission heard Appeal Nos. 172-79 (Faria Family/Basso, Green and Dietrick) and 173-79 (Faria Family/Lindsey). The Commission determined no substantial issue had been raised, and by that action sustained the South Central Coast Regional Commission's use of deed restrictions in lieu of offers to dedicate easements to achieve Chapter 3 public access consistency in the subject permit actions. The Regional Commission had found that deed restrictions were appropriate due to the particular nature of the Faria Tract. The Faria family had previously dedicated land for an oceanside public park, Faria County Park (Exhibit 3). In addition the Faria family and their lessees had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and re-pass lateral access along the shore (During the Regional Commission hearings, the Faria family representative stated that the public has had lateral access rights as described by permission of the Faria family). Finally, the Faria Tract has been in a lease-hold situation since the early part of this century. The lessee applicants could not grant public access dedications on land belonging to someone else. Thus, the Regional Commission determined that the use of deed restrictions for provisions of access was appropriate.

The application was filed on March 1, 1982 and the applicants on an Administrative Permit Calendar, received approval for the proposal with conditions on April 7, 1982. The conditions included a requirement for a lateral access deed restriction, a waiver of public liability, and an agreement on public rights. The lateral access condition specifically required the applicants to record a deed restriction acknowledging the right of the public to pass and repass across the subject property in an area bounded by the mean high tide line at one end and to the toe of the revetment at the other end along what is known as Faria Beach. The item was reported on the administrative calendar at the Commission meeting of April 7, 1982. Prior to the Commission meeting, the applicants requested in writing a public hearing on the project pursuant to regular permit procedures. The applicants' grounds for requesting the hearing were that the proposed lateral access deed restriction condition could only be imposed subsequent to an evidentiary hearing at which the project was shown to have a direct adverse impact on public access to the sea, and that even if such evidence could be produced, an access condition could not be imposed on the project because of the existence of adequate lateral access at a County Park which is approximately 2,520 feet to the west (Exhibit 3). The applicants also state that the Faria Trust has also given to the people of California an additional public beach area known as the "Cove" which is located approximately 1,800 feet downcoast of the subject project site.

Section 13153 of the Commission's regulations requires the vote of one-third of the appointed membership of the Commission to remove an item from the administrative calendar for individual public hearing. That vote was not achieved, and the permit was approved with conditions as reported on the administrative calendar.

The applicant rejected the Commission's access requirement and filed a petition for administrative mandamus in the Superior Court for the County of Ventura challenging the access requirement. On June 19, 1982 the

Court ordered the case remanded to the Coastal Commission stating:

> " . . . The Commission may constitutionally require a grant of public access only when the facts in the case before it demonstrates that a proposed development will place a burden on public access to the coast . . . although the house that will be built by petitioners is nearly three times as large as the small house now on the property, the *record does not show at this time* that its placement on existing residential private property will burden the public's otherwise available access to the beach . . .
>
> Though the Legislature intended that the construction of single-family residences on vacant lots be considered new development subject to the access requirements of Section 30212, it did not intend that the expansion or enlargement of an existing residence be considered new development absent a showing that they had an individual or cumulative adverse impact on public access to the sea. This is so because the impact of construction on vacant land is fundamentally different from the impact of the enlargement or expansion of any existing use.
>
> Inasmuch as the Legislature intended for the Commission to establish that a project which expands an existing use has an individual or cumulative adverse impact on public access to the sea before finding that it is new development within the meaning of Section 30212, it was an abuse of discretion for the Commission to refuse to set petitioners' application for a full public hearing so that an evidentiary record could be established with respect to this issue . . ." (emphasis added)

This application was originally approved under the administrative permit procedures of the Commission. The findings and declarations were brief because the conditional approval was fully consistent with past permit activity in the immediate vicinity and elsewhere which had been extensively analyzed in findings over the years,

and therefore additional extensive discussion was unnecessary. Additionally, one of the applicants (Faria Trust) had complied with similar conditions imposed on similar development in the past. Therefore, the Court found a lack of substantial evidence within the administrative record to justify the decision reached by the Executive Director and concurred in by the Commission to impose a requirement of lateral access.

B. *Public Access*

The applicant is proposing to demolish an existing residence and to construct a residence three times as large on an oceanfronting lot. There are several Coastal Act policies contained in Chapter 3 related to shorefront development and whether or not such development would require provisions of public access for consistency with the Coastal Act:

Article X, Section 4 of the California Constitution provides:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for *any* public purpose . . . and the Legislature shall enact such law as will give the *most liberal construction* to this provision so that access to the navigable waters of this state shall *always be attainable* for the people thereof." (Emphasis added)

The Coastal Act sections which carry out the Constitutional direction on public access are 30210, 30211, 30212 and 30214 as follows:

Section 30210

> In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private

property owners, and natural resource areas from overuse.

Section 30211

Development shall not interfere with the public's right of access to and along the sea where acquired through use or legislative authorization, including but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

Section 30212

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessways shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For the purpose of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure

by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the regional commission or the commission determines that such activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

Section 30214

(a) The public access policies of this article shall be implemented in a manner that takes into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case including, but not limited to, the following:

(1) Topographic and geologic characteristics.

(2) The capacity of the site to sustain use and at what level of intensity.

(3) The appropriateness of limiting public access to the right to pass and repass depending on such factors as the fragility of the natural resources in the area and the proximity of the access area to adjacent residential uses.

(4) The need to provide for the management of access areas so as to protect the privacy of adjacent property owners and to protect the aesthetic values of the area by providing for the collection of litter.

(b) It is the intent of the Legislature that the public access policies of this article be carried out in a reasonable manner that considers the equities and that balances the rights of the individual property owner with the public's constitutional right of access pursuant to Section 4 of Article X of the California Constitution. Nothing in this section or any amendment thereto shall be construed as a limitation on the rights guaranteed to the public under Section 4 of Article X of the California Constitution.

(c) In carrying out the public access policies of this article, the commission, regional commissions, and any other responsible public agency shall consider and encourage the utilization of innovative access management techniques, including, but not limited to, agreements with private organizations which would minimize management cost and encourage the use of volunteer programs.

In addition, the certified Ventura County Land Use Plan (LUP) states the following objectives and policies for achieving public access when considering requests for new coastal development. The pertinent lateral access LUP policies are:

Objective

To maximize public access to the North Coast sub-area consistent with private property rights, natural resources and processes, and the Coastal Act. Also, to maintain and improve existing access, as funds become available.

Policies

Lateral

2. For all new development between the first public road and the ocean, granting of lateral easements to allow for public access along the shoreline shall be mandatory unless subsection (a) below is found. In coastal areas, where the bluffs exceed five feet in height, all beach seaward of the

base of the bluff shall be dedicated. In coastal areas where the bluffs are less than five feet, the area to be dedicated shall be determined by the County. At a minimum, the dedicated easement shall be adequate to allow for lateral access during periods of high tide. In no case shall the dedicated easement be required to be closer than 10 feet to a residential structure. In addition, all fences, no trespassing signs, and other obstructions that may limit public lateral access shall be removed as a condition of development approval.

a. Findings are made, consistent with Section 30212 of the Act, that access is inconsistent with public safety, military security needs, or that agriculture would be adversely affected, or (sic) . . .

The major public access question before the Commission is whether or not this development proposal would place a burden on the public's right of access to and along the coast which must be mitigated by a grant of public access as a condition of allowing expanded residential development on the subject parcel.

The Commission notes that new development projects for private residential purposes can have individual and or cumulative negative impacts on public access to and along the shoreline. The Commission's own ten-year permit and planning experience has demonstrated that private development along the shoreline causes adverse impacts on the use of the state owned tidelands by the general public. This adverse impact has also been demonstrated in non-coastal areas of the state as well as in other areas of the United States. According to David J. Brower, Associate Director at the Center for Urban and Regional Studies at the University of North Carolina at Chapel Hill:

> "The argument for a strong public policy encouraging public access to the nation's beaches is a simple one. There has always been a strong demand for the use of beaches, and that demand is increasing and will continue to increase for some time to come. The public now owns and/or has the right to use vast stretches

of the coast. The problem is that often there is no way for the public to get to those portions of the coast that they have the right to use because it is separated from the nearest public road by privately owned land. The result is that many stretches of public beach are accessible only by long hikes, by boat or by trespassing on private land. This problem is becoming increasingly intense because private land that has been traditionally used by the public is being converted to more profitable uses by the owners, and in some cases accessways that have been dedicated to the public are being withdrawn. Unless there is a strong public policy to obtain new accessways and to protect existing ones, the amount of beach available to the public use will continue to decrease at the same time the demand for it is increasing.

The applicants' project would demolish an existing 521 sq. ft., one-story single-family residential structure without a garage or formalized parking area, and would construct a new two-story, three-bedroom single-family residence with attached two-car garage. The applicant states the proposed replacement dwelling would result in 1,674 sq. ft. of liveable floor space, with a 469 sq. ft. garage. The proposed development would increase lot coverage so that the results of development would create lot coverage by residential structures totalling 2,464 sq. ft. The applicant's lot is 2,800 sq. ft. in size. The new dwelling would be approximately three times the size of the existing dwelling to be demolished.

The Commission notes the proposed development would result in an increase of 10 percent or more of internal floor area, and the Commission therefore finds the applicant's proposal requires a coastal development permit.

Section 30212(a) states that public access from the nearest road to and along the coast shall be provided in "new development" projects except where it is inconsistent with public safety, military security needs, protection of sensitive resources, protection of agriculture or where adequate access exists nearby.

The next analytical determination the Commission must make is whether or not the proposed development can be defined as "new development". The Legislature has determined that certain categories of development are not "new development" for application of the access policy contained in Section 30212. These exceptions are listed in Section 30212 of the Act, and include certain replacement, demolition and reconstruction, improvements to existing structures and certain repair and maintenance activities. The applicants' project involves demolition and reconstruction, but also increases the floor area, height and bulk of the existing residence by more than 10 percent. The new residence will extend further seaward (to the south) towards the existing seawall, and closer to adjacent residential structures on the lots located to the east and west of the subject site. The increase in size and lot coverage does constitute an increase in use of the subject land, and does warrant a definition by the Commission of being "new development" pursuant to Section 30212(b) of the Act. The Commission finds the proposed development is "new development" which generates a burden on public access opportunities and therefore, as a condition of approval, must provide a public access benefit.

The Commission finds the applicants' project as proposed would have both individual and cumulative adverse impacts on public access which must be mitigated. The existing residence occupies approximately 63% of the parcel. The proposed development would occupy approximately 88 percent of the parcel. The applicants contend the existing residence is too small for the Nollan family, and the new residence would result in more reasonable living conditions (from a small, one-bedroom house with bunkbeds and no garage to a large, three-bedroom house with covered garage).

First, the applicants propose to increase lot coverage with private residential use which, after development occurs, would present an psychological barrier to the public trying to continue use of the public tidelands situated directly south of the subject site of development. The resulting

development would block existing air space through which the public can view the available shoreline from the adjacent public road, Old Coast Highway. The project would increase lot coverage by 25 percent, is a full story of living space higher and extends further seaward toward the existing seawall. In addition, the new development would increase site coverage to the north and south adjacent to the structure located to the east, and would increase site coverage north, south and to the east of the structure located to the west. Finally, on either side of the applicants' lot existing dwellings have been removed. New, larger replacement dwellings have been approved for these lots with imposition of a condition requiring consent to public access. Cumulatively, replacement construction will block existing visual access from Old Coast Highway.

The Commission has determined in past permit decisions that the public is attracted to beachfront areas which are visually and physically accessible from the first public road adjacent to the beachfront area in question. If there appears to be a "wall" of residential structures, the public is prevented, psychologically after viewing the "wall", from realizing a stretch of coastline exists nearby that they have every right to visit. This Commission determination has been substantiated in other areas of planning management within the state as well. In 1977, a household survey was conducted in San Diego to compile data for a San Diego Access Study. The study demonstrated that the overall quality of a beachfront recreational area was the most important factor in deciding which beach recreational area would be visited. The study indicated that the most important reasons why beach visitors selected a certain beach area were: 1) beach quality; 2) parking availability; 3) accessibility from inland areas; and 4) lack of traffic congestion. The study conclusions indicated:

> If accessibility and parking availability are as important as indicated by these responses, substantial numbers of recreationists will search for less crowded and more easily accessible resources automatically when their traditional resources are perceived as becoming too crowded or inaccessible.

The Commission notes the study indicates that beach quality and accessibility are major factors for determining choice of beach area. If the beach cannot be seen due to an increase in building coverage on lots which stand between the first public road and the sea, the public will search further and impact beach recreational areas elsewhere that may not be equipped to handle the extra capacity of beach use visitors. In the applicants' case, the public has the expectation that the Faria beachfront can be visited (Exhibit 4). As the applicants' residential use of the lot increases, and as other lessees expand residential building coverage on their lots, the public may get the impression that the beachfront is no longer available for public use. This is due to the encroaching nature of private use immediately adjacent to the public use, as well as the visual "block" of increased residential build-out impacting the visual quality of the beachfront.

The applicants contend that the proposed development would not increase the intensity of use on the subject parcel; they contend that the proposed development would reduce the intensity of use because the existing dwelling contains four sets of bunk-beds which could accommodate eight occupants. The proposed new dwelling would contain three bedrooms, but would be utilized by the Nollan family which totals four individuals. Because of the reduction in individual use under the Nollans' occupancy, the applicants therefore argue that the proposed development would result in a reduction in the intensity of use on the parcel.

The Commission does not agree with this contention. The existing dwelling is a vacation rental, and has functioned as such during the forty years that the Nollans have been involved in ownership or leasehold over the respective site. As a vacation rental, the existing dwelling is not committed to full-time, permanent single-family residential use; there are periods of the year when no one

would be utilizing the subject site as a vacation spot due to stormy weather conditions. The proposed new dwelling may be occupied year-round initially by the Nollan family. However, there is no guarantee of how many persons would occupy the proposed structure during the life of the project. Even if the structure is committed to full-time permanent single-family use, the applicants could sell the property to a new occupant with a larger family which could be easily contained in a three-bedroom, two-story home. Thus, although a reduction in use would occur if occupancy were to be permanently limited to four individuals, there is not guarantee that this factor of occupancy would stay constant during the entire life of the residential structure.

Further, intensity of use of a given area is not merely defined by how many individuals occupy a structure on that area. Intensity of use of a land area can be defined by actual lot coverage by residential structures and uses. The existing one-story building occupies approximately 63 percent of the subject site; thus, an increase of approximately 25 percent in the intensity of use demonstrated by lot coverage would occur. Therefore, the Commission finds the applicants' project as proposed would result in an increase in intensity of use.

The Commission notes that the Faria Beach Tract was originally a tract composed of small beach cottages which primarily functioned as vacation homes. As in other areas of the state, the secondary vacation homes are being demolished and replaced with larger, primary residential structures, which will result in an increase in demand for full-time residential services in the project vicinity. Clearly reconstruction and enlargement of houses in the Faria Beach Tract will induce additional growth in the area of Faria Beach, as it changes from a recreational beach community to one of primary residences. Facilities such as stores, gas stations and restaurants will be necessary to service the residents of the Faria Beach community. Also, housing will be required for the people who work at such facilities as well as for the people who construct houses

at Faria Beach and related facilities. The people who are attached to the area because of employment as a direct result of increased residential use of the Faria Beach Tract are entitled to have access to their public tidelands. Thus the need for public access at Faria Beach is, in part, directly related to the build-out at Faria Beach. The Commission notes that this phenomena has occurred in other portions of the state, including Malibu and Manhattan Beach.

In Santa Monica, a beach use survey was conducted in 1979 by the City for the access and recreation components of its Land Use Plan./ The Santa Monica beach users also indicated that convenience, ease of parking, lack of crowds and beach/water conditions were major factors in determining which beach area to visit. Because the Santa Monica beachfront is very accessible to the public, many of the beach users indicated they selected Santa Monica State Beach because it was easy to get to from inland areas, and appears attractive to visit.

The applicants propose to place residential structures between the seawall and the location of the existing dwelling. The existing seawall is located very near to the mean high water line. When the beach has experienced the greatest accretion during a given year, the existing seawall appears to be about ten feet away from the mean high water line. During the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall; this site phenomena has been noted by State Lands Commission staff doing preliminary boundary line investigations on the subject site. The placement of more private use adjacent to public tidelands has the potential of creating use conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is

located. If the applicants' project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroachment area could result in use conflict between private and public entities on the subject shorefront, and may even result in private use being situated upon public lands.

Regardless of the boudary line issue, the Commission finds the proposed development would increase private use immediately adjacent to public tidelands which has the potential of causing adverse impacts on the public's ability to traverse the shoreline. The Commission notes that the applicants' project proposed to place more private use adjacent to the public lands can be demonstrated to have both individual adverse impacts as demonstrated above, and cumulative impacts if the entire Faria Beach Tract continues to expand as full-time residents/owners replace vacation homes with larger homes as demonstrated by the rebuilding on either side of the project site. Each new resident/owner could also place more private structures adjacent to the public tidelands which cumulatively would present an illusion of private beach to the visiting public. The visiting public, looking for an overall beach resource experience, would be discouraged from using the beachfront or the Faria Beach Park due to the impacting nature of residential development along the shoreline. In *The Cumulative Impacts of Shorezone Development at Lake Tahoe,* the consultants studied the existing lakefront use and the potential build-out around the lakefront. The consultants also conducted lake use surveys among landowners as well as the visiting public. The study noted that "the increasing structure density that will characterize maximum buildout will significantly reduce user enjoyment in some areas of the shorezone, due largely to aesthetic impacts." The study defined the parameter for determining impact on recreational use areas:

> The sensitivity of recreational uses and aesthetic conditions to impact it defined by a variety of elements. These include such parameters as: the degree of public access; ownership of the backshore; the types

> and intensities of historic public use of the shorezone; the availability of alternative sites for recreation in the shorezone; and the degree of visual exposure of the shorezone to viewpoints from the lake, from along the shoreline, and from adjacent scenic highways.

The consultants indicated that:

> A change in structures at any site is thru linked to changes in the pattern and volume of recreational activities throughout the shorezone and to total use of the shorezone and Basin . . .
>
> . . . A second factor is access. Given a structural change, the degree to which people respond to it depends, in part, on extent of current use of the site and the ease with which the site can be reached. Access at Tahoe is limited, both by physical barriers and by legal questions concerning public access to areas backed by private ownership. *To an undetermined degree, shorezone structures may pose a psychological restriction to public access by implying private ownership or control over the foreshore and nearshore zones.* . . . (emphasis added)

The consultants' beliefs were substantiated by the results of the surveys conducted. The User Survey indicated that respondents generally cited crowding and overdevelopment as primary impediments to their use of the shorezone. The Survey results demonstrated:

> In response to a request for general comments, a plurality (39 percent) of those responding argued for protecting the ecology of Lake Tahoe, limiting development and reducing crowding. In response to a request for suggestions concerning the more efficient use of shorezone facilities, 15 percent of respondents recommended limiting growth of crowds. Physical barriers, however, were cited by a significant number of respondents: 17.7 percent argued for more parking, 13.3 percent for more boat facilities, and 7.1 percent for more public beaches . . .

The Lake Tahoe study also examined user reactions to beaches with varying densities of use. Seventy-five percent of respondents reported they would definitely use low-density beaches.

The Commission notes that Section 30212.5 of the Act provides that wherever appropriate and feasible public facilities shall be evenly distributed throughout a beach use area so as to mitigate against the impacts of overcrowding or overuse by the public or a given area. As private development increases along the shoreline, public use of these areas decreases. The public then travels to other areas which are already heavily utilized, and instances of overcrowding begin to occur. In the applicants' case, increased private development within the Faria tract will continue to present psychological barriers to public use of the shoreline, and less visitation may occur due to the expectation of limited use presented by close "walls" of private residential development.

In Coastal Recreation: A Handbook for Planners and Managers, produced by the U.S. Department of Commerce in January, 1976 indicated three of the major problems facing recreation resources planners and managers were: 1) peak recreation use periods; 2) the shoreline of most of the United States is in private ownership; and 3) the shore supply of existing public shoreland and access areas is near saturation. The Handbook states:

> Of the 60,000 miles of shoreline of the 48 contiguous states, only about one-third is considered suitable for recreation activities. Only 5.5 percent of this recreational shoreline is in public ownership, with 3 percent restricted for military purposes and 91 percent in private ownership . . . When the total coastal shoreline (not recreational or effective shoreline) of the 48 contiguous states is considered, less than 2 percent is in public ownership . . .
>
> . . . Not only is most coastal land in private ownership, but this land is being developed. For example, in the Recreation Element recently prepared by the South Coast Regional Commission (California) it was noted that 'roughly 20 miles of the 110 mile coast of mainland Orange and Los Angeles Counties have views blocked totally by structures.' Traditionally, land values decrease the farther one moves inland with one exception—namely, those parcels of land with view of the coast or shore. These private values, as well as the more compelling public values, are lost when visual access is blocked. The lack of visual access is particularly critical for coastal recreation activities . . . their view is their sole tie to the shore and sea . . .

The Commission finds that California's thousand mile coastline is one of her most precious and intensely used resources. Three quarters of the state's population lives within an hour's drive of the Pacific Ocean. The Commission notes that there are insufficient coastal recreational facilities to serve this population. Accordingly, each year hundreds of thousands of frustrated vacationers are turned away from coastal facilities. Moreover, hundreds of miles of publicly owned tidelands already have been walled off from the public by high-raise developments, private clubs and private residential development. (See, e.g., the following government documents for this information; California Department of Ocean and Navigation Development. *Comprehensive Ocean Area Plan and Supplement* (1971); California Department of Fish and Game, *Fish and Wildlife In the Marine and Coastal Zone* (1971); California Department of Conservation, Division of Mines and Geology, *Non-Living Resources of the Coastal Zone* (1971); California Department of Parks and Recreation *California Coastline Preservation and Recreation Plan* (1971).)

Thus, as evidenced by planning sources from other regions, public use of the shoreline can be limited by factors of private buildout, if the private buildout blocks visual access to the coastline and increased demands for full time residential support services. The Commission finds that the applicants' proposed development would present an increase in view blockage, an increase in private use of the shorefront, and that this impact would burden the public's

ability to traverse to and along the shorefront. The Commission finds this burden on public access within the Faria beachfront Tract must be mitigated by some provision of public access benefit, pursuant to the public access policies contained in Chapter 3 of the Coastal Act.

The Commission must now determine what constitutes an appropriate public access requirement, in view of the applicant's proposed development, and in view of past permit procedures in the Faria beachfront tract. The Commission has previously required the recordation of lateral access deed restriction allowing the public the right of pass and re-pass lateral access along the shoreline, consistent with the Faria Family's previous approval of that form of access.

The applicants contend that Section 30212(a) provides that new development should not be required to provide public access if adequate access exists nearby and that adequate access does exist nearby. The public beach called the Cove is approximately 1800 feet downcoast from the project site (Exhibit 3). Therefore the applicants contend a provision of lateral access even if limited to pass and re-pass and in the form of a deed restriction rather than an outright offer to dedicate is not mandated by the provisions of Section 30212 of the Coastal Act.

In examining the provisions of Section 30212(a), the Commission must determine whether it is inappropriate to require such a form of lateral access. First, pursuant to the provisions of Section 30212(a), a provision of the above-described form of lateral access would not be inconsistent with public safety, military security needs, protection of fragile coastal resources or agricultural operations on the applicant's respective parcel. Further, public access is not "adequate" in the subject area.

The applicants contend that there is adequate public access because of the existing Faria County Park and the Cove beach area. They state that vertical access to and from these public areas exists, and that lateral access along the shore within park limits also is available for public use.

They content that the two parks and other existing vertical accessways constitutes adequate public access pursuant to Section 30212(a) of the Act.

The Commission disagrees with the applicants' contention. The Faria County Park is located between one-quarter to one-third of a mile upcoast, and the Cove beach area is located approximately 1,800 feet downcoast (Exhibit 3). The public has been given permissive use to travel along the shoreline within the *entire* tract by the respective owners in the past, and in several permit actions the Commission has required as conditions of approval the recordation of deed restrictions for lateral access limited to pass and repass along the entire shoreline, including areas beyond the park limits. The Faria Beach shoreline fluctuates during the year depending on the seasons and accompanying storms, and the public is not always able to traverse the shoreline below the mean high tide line. The Commission notes that the public does not know the exact locations of existing deed-restricted access areas, and that the public has had the expectation that lateral access so described is available in the project vicinity. The past required deed-restricted access becomes less effective if development situated between two restricted areas is not conditioned to provide a similar provision of access to compliment existing provisions. Further, the Commission notes that the purpose of access to and along the shore is not to achieve visual access to and from the first public road to and from the shoreline. Section 30212 requires that new development provide the public with the opportunity of access to and along the coast if the new development imposes a burden on existing access opportunity as does this project.

The applicants state that they have always permitted the public to pass along the shoreline adjacent to their existing dwelling. The Commission notes that the proposed dwelling will most likely have a longer life than the individuals currently proposing to re-occupy the structure and land. The Commission also notes that absent a deed restriction the Nollans cannot guarantee that access along the coast will always be freely given for the life of the proposed dwelling.

The Commission finds the applicant's lot is located along a unique stretch of coast where lateral public access in inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline. At times the wet sandy beach extends up to both the applicant's and other residents' existing seawalls, preventing pedestrian passage when the tide is in. Finally, the Commission notes that there are several existing provisions of pass and re-pass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment. The Commission therefore finds that, pursuant to the public access policies and specifically Section 30212(a), that adequate public access does not exist nearby and a deed restriction offer to allow the public pass and re-pass rights is consistent with both past Commission action and with the site's ability to provide such access. Therefore, the Commission finds the proposed development, as conditioned to provide a provision of lateral access, is consistent with Sections 30210-30214 of the Coastal Act of 1976.

3. *Prescriptive Rights—Sovereignty.* Section 30211 of the Coastal Act provides that development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization. As noted previously, there is some question as to whether or not the boundary between private and public property has been properly sited due to changes in the subject shoreline. At the request of Commission staff, a Senior Lands Agent from the Office of the Attorney General conducted an investigation into the existence of a public claim to a right of access across and passive recreational use of the area immediately seaward of existing revetments at the Faria Beach residential community. The agent also investigated public claims to access immediately seaward of the project site (Exhibit 4). The agent studied the beach area and interviewed 30 people; he received 18 declarations from users of the beach. The agent concluded:

> . . . it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not publicly owned, has been impliedly dedicated to the public for passive recreational use . . .
>
> . . . In my visits to the area I have interviewed 30 people . . . The individuals to whom I have spoken and the declarants include both surfers and beach hikers and bathers. All these individuals indicated to me that they have used the beach without permission from any of the adjacent owners and have always believed it to be public in nature. In addition they have indicated that they have utilized the beach in good weather year round from 1945 to the present and have observed others using it as well during those periods.
>
> Though I have not obtained any declarations from the Faria Beach residents, my conversations with some of the residents who are members of the homeowner's association, tends to confirm a long history of public use of the area in question as well as suggesting a policy by the Faria Family that such public use should not be intererred with.
>
> In summary, it is again my opinion that the area at issue, if not already publicly owned, has been impliedly dedicated to the public . . .

The Commission finds based on the signed declarations of use and on the above-cited Senior Lands Agent's opinion that there is evidence of historic public use along the shoreline in the project vicinity. In addition, the Commission finds based upon statements made by Lindsay Nielson, agent of the Faria Family, during Commission consideration of Appeal Nos. 172-79 and 173-79 (Faria Family/Basso, Green and Dietrick) beach community, that the owners of the Faria Tract have not prevented public use along the shoreline. The Commission also notes the lack of any posted signs regarding the public or private nature of lateral access along the shoreline of the subject parcel. The

Commission finds that Section 30211 of the Act requires development to not interfere with the public's right of access to and along the sea where acquired through use. The Commission finds there is evidence of historical public use in the project vicinity, and, pursuant to Section 30211 that such public use shall be protected when reviewing development for consistency with the Coastal Act. Although the applicants contend that they will permit public lateral access limited to pass and re-pass on a case-by-case basis, the Commission finds the current applicants cannot guarantee that lateral access so described will be freely given for the life of the proposed development. The applicants could post signs to make clear that public access along the shoreline is given by permission only, and that permission may be withdrawn at anytime. The Commission notes the applicant's lot has not been so posted; thus, there has been no indication to members of the public that this access use has been by consent. The Commission finds, therefore, that continued public use along the shoreline should be protected and maintained in new development proposals.

The Senior Lands Agent also investigated the sovereign nature of the site seaward of the existing revetment. He concluded that in his opinion, presently most, if not all of Faria Beach waterward of existing seawalls lies below the mean high tide level, and that the land would therefore fall in public domain or sovereign category of ownership. The agent noted that his opinion should be more definitely investigated; however, the Commission finds the possibility of possible sovereign lands on the subject site exists and should be protected for further investigation. The Commission finds therefore, based upon evidence of public use along the shoreline of the subject site, and based upon preliminary opinions about the sovereign nature of the site seaward of the existing seawall, that the proposed development must include assurances for continued lateral access across the site, limited to pass and re-pass, for the project to be consistent with Section 30211 of the Act. The special conditions provide for the recordation of a deed restriction for lateral pass and re-pass access and for non-interference

by the applicant, when investigating regarding sovereignty are conducted. Therefore, the Commission finds the proposed development, as conditioned to protect for such study and to provide lateral access, is consistent with Section 30211 of the Coastal Act.

4. *Local Coastal Program.* Section 30604 of the Act provides that development shall not prejudice local governmental efforts to prepare local coastal programs that are consistent with the public resource policies contained in Chapter 3 of the Coastal Act of 1976. The Ventura County Land Use Plan was certified by the Commission as resubmitted by the County in January, 1982, and the zoning portion of the Local Coastal Program for the County was certified subject to suggested modifications by the Commission on April 28, 1983. The approved access policies previously cited in this report thus, must be considered so that the Commission can determine whether or not the subject development is consistent with the County's LCP. The County access policies call for a maximization of public access along the shoreline, and specifically indicate that for all new development between the first public road and the ocean, a lateral easement grant is appropriate to allow for public access along the shoreline, so long as consistency with Section 30212(a) is assured. The Commission has determined that the subject development can provide access pursuant to the exceptions listed in Section 30212(a); therefore, the Commission finds the subject development as conditioned to provide for a lateral access easement is both consistent with relevant access policies contained in the Coastal Act and in the County's Local Coastal Program. Thus, the Commission finds that the proposed development must provide for a lateral access easement for consistency with Section 30604 of the Act.

5. *Waiver of Public Liability—Coastal Hazards.*

Public Resources Code Section 30253 states:

> New development shall:
>
> 1) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

2) Assure stability and structural integrity, and neither create nor contribute, significantly to erosion, instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural land forms along bluffs and cliffs.

The Ventura County certified Land Use Plan states on pages 52-53, "The North Coast beaches are highly vulnerable to erosion and wave damage. Dredging operators in Santa Barbara Harbor alter sand transport downcoast. Without adequate replacement sand, high tides and waves erode the beaches. Beachside designated "communities" are losing beach front during these times, and seawalls are being undermined, critically endangering residences. Affected areas are: . . . V. Faria Beach Colony: Erosion and flooding at high tide are continuing problems. Seawalls are being undermined." The Department of Navigation and Ocean Development designated this area as "Future Use Critical".

In addition, the Ventura County Public Works Agency Flood Control District described the problems and recommendations to be considered in a Beach Erosion Study conducted by the U.S. Corps of Engineers. The Faria Beach Colony was described as follows:

6. *Faria Beach Colony*:

Problem: The beach is continually eroding, undermining the seawalls in front of the the beach homes. Some of the seawalls show severe deterioration. During high waves and high tides, many beach homes are flooded from the wave splash and run-up. Many claim that historically the beach was much wider and at higher elevation.

Concern: The colony is in private ownership; however, many surfers and beach walkers use the beach. The residents are concerned by deteriorating seawalls and loss of the beach area, and would like the wider beach restored.

Recommendation: Consideration should be given to a type of seawall that will minimize the continuing erosion.

There is an existing seawall in front of the residence. The applicant has not proposed modification of the seawall but has proposed construction seaward of the existing residence. As the project site is located in an area subject to hazards from flooding and wave action, a waiver of public liability for approving the proposed development is necessary to find the development consistent with the Coastal Act.

EXHIBIT A

A. *Standards Conditions.*

1. *Notice of Receipt and Acknowledgement.* The permit is not valid and development shall not commence until a copy of the permit, signed by the permittee or authorized agent, acknowledging receipt of the permit and acceptance of the terms and conditions, is returned to the Commission office.

2. *Expiration.* If development has not commenced, the permit will expire two years from the date on which the Commission voted on the application. Development shall be pursued in a diligent manner and completed in a reasonable period of time. Application for extension of the permit must be made prior to the expiration date.

3. *Compliance.* All development must occur in strict compliance with the proposal as set forth in the application for permit, subject to any special conditions set forth below. Any deviation from the approved plans must be reviewed and approved by the staff and may require Commission approval.

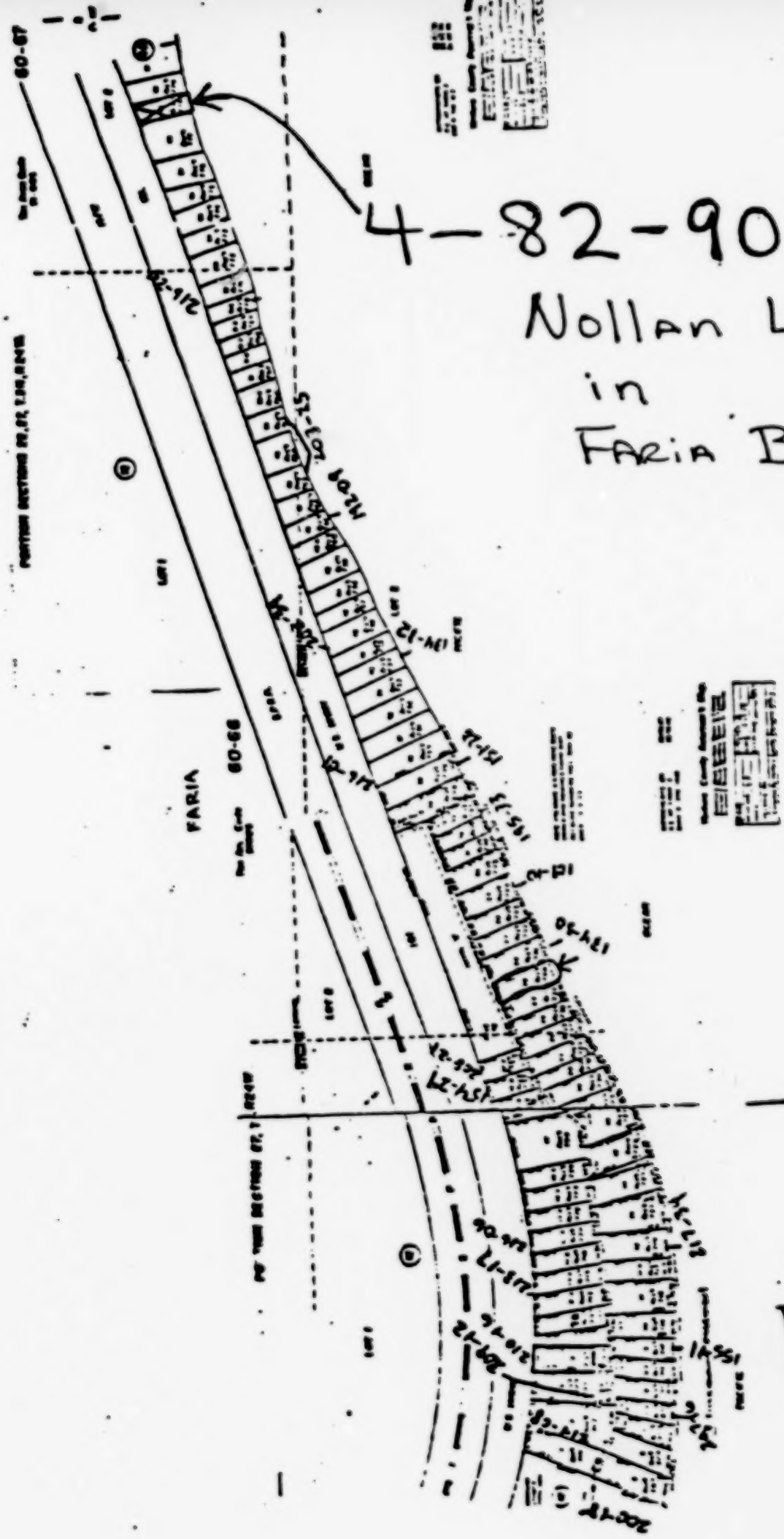
4. *Interpretation.* Any questions of intent or interpretation of any condition will be resolved by the Executive Director or the Commission.

5. *Inspections.* The Commission staff shall be allowed to inspect the site and the development during construction, subject to 24-hour advance notice.

6. *Assignment.* The permit may be assigned to any qualified person, provided assignee files with the Commission an affidavit accepting all terms and conditions of the permit.

7. *Terms and Conditions Run with the Land.* These terms and conditions shall be perpetual, and it is the intention of the Commission and the permittee to bind all future owners and possessors of the subject property to the terms and conditions.

000150

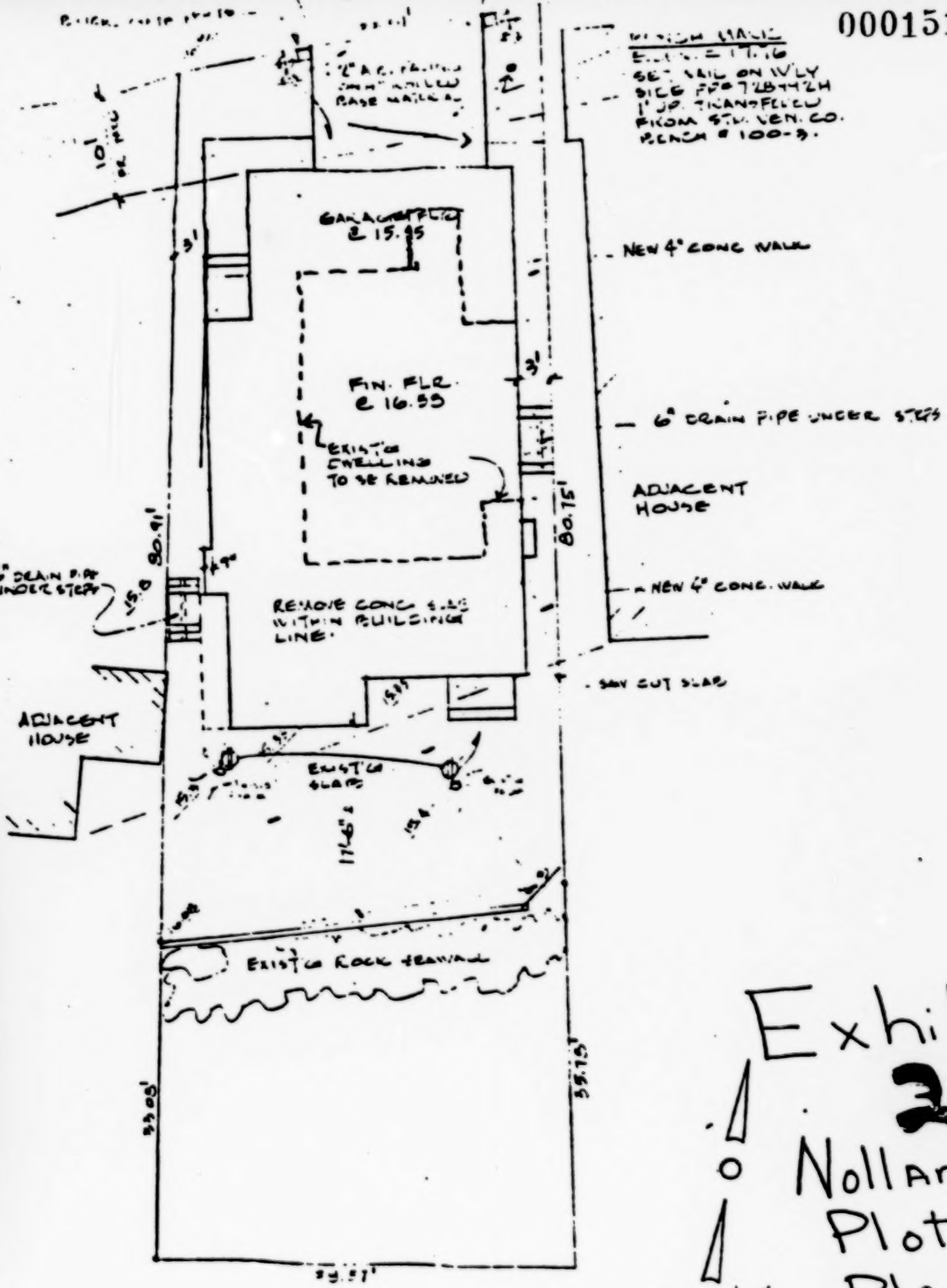


4-82-90

Nollan Lot
in
Faria Beach

Exhibit
1
4-82-90

000151



BCL

Exhibit 3

Nollan Plot Plan

4-82-90

BEST AVAILABLE COPY

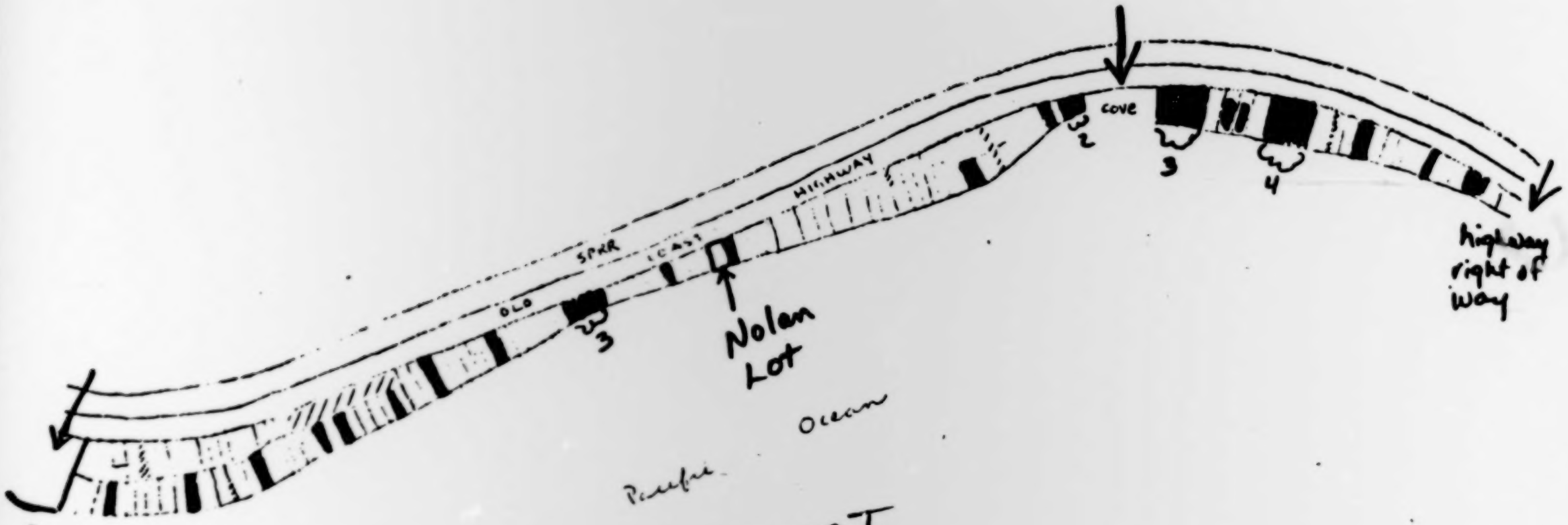
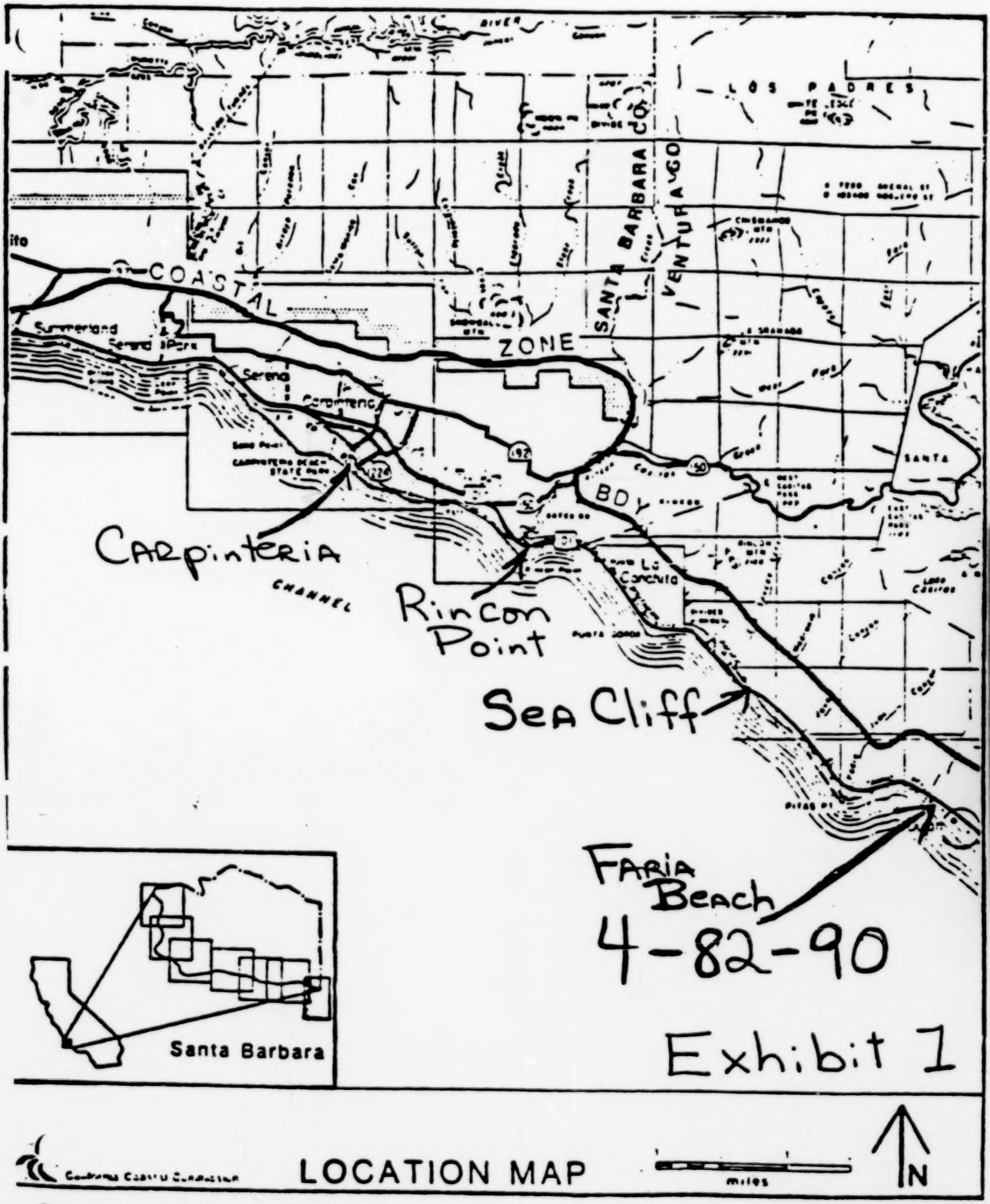


Exhibit 3

BEST AVAILABLE COPY



County of Santa Barbara

Sheet 7 of 7
Attachment A

BEST AVAILABLE COPY

Attachment A, Exhibits 2 and 3, appear at pages 000175 and 000176, respectively, in the second administrative record.

ATTACHMENT A

I, Merle Eugene Betz, Jr., declares as follows:

1. That I am presently employed as a Coastal Program Analyst for the California Coastal Commission. I have been employed in this or a similar capacity since November. 1977.

2. That as part of my duties I have the responsibility for projects located in the coastal zone in Ventura County.

3. That I have been assigned the task of preparing staff reports for projects located in the Faria Beach Community in Ventura County. One of the projects for which I prepared a staff report was Application #4-82-90, filed by the Faria Beach Trust and James and Marilyn Nollan.

4. That my review of the Commission's records with respect to applications filed with respect to projects located on the shorefront portions of the Faria Beach Community shows that since June, 1979, the following projects have complied with the access requirements of the Coastal Act by recording deed restrictions permitting the public to pass and repass across subject property on which the project was located from the mean high tide line at one end to the toe of a revetment at the other:

Project/Address	*Application Number*	
Single family residence 4270 Faria Road	Regional	#207-16
Single family residence 3974 W. Pacific Cst Hwy	Regional	#208-34
Single family residence 3488 W. Pacific Cst Hwy	Regional	#211-21

Project/Address	*Application Number*	
Seawall 3864 W. Pacific Cst Hwy	Regional	#216-25
Single family residence 3526 W. Pacific Cst Hwy	Regional	#217-13
Seawall repair 3518 W. Pacific Cst Hwy	State	#4-81-351
Seawall 3486 W. Pacific Cst Hwy	State	#4-81-152
Seawall repair 3478 W. Pacific Cst Hwy	State	#4-81-153
Porch enclosure and house expansion 417[illegible] Faria Road	State	#4-81-329
Seawall repair 3690 W. Pacific Cst Hwy	State	#4-81-428
Add rip-rap to seawall 3692 W. Pacific Cst Hwy	State	#4-81-454
Single family residence 3996 W. Pacific Cst Hwy	State	#4-81-463
Single family residence 3750 W. Pacific Cst Hwy	State	#4-81-464
Single family residence 3502 W. Pacific Cst Hwy	State	#4-82-29
Single family residence 4192 Faria Road	State	#4-82-104
Single family residence 3674 W. Pacific Cst Hwy	State	#4-82-135
Single family residence 4202 Faria Road	State	#4-82-262
Single family residence 3816 W. Pacific Cst Hwy	State	#4-82-280
Single family residence 3962 W. Pacific Cst Hwy	State	#4-82-439

I declare, under penalty of perjury, that the foregoing is true and correct in all respects and if called as a witness I could and would competantly testify thereto.

Executed this 24th day of November, 1982, at Santa Barbara, California.

/s/ Merle Eugene Betz, Jr.

ATTACHMENT B

Kenneth B. Kilbourne
Post Office Box 813
1548 Lisa Street
Carpinteria, Calif. 93013

June 19, 1979

CALIFORNIA COASTAL COMMISSION
631 Howard Street
San Francisco, CA 94105

Appeal No. 172-79 & 173-79 Faria Family Partnership (& James Basso, Doug Green, Everett Dietrick) and Faria Family Partnership (& Wm & Freeda Lindsay). Construction of seawall with backfill for residence between Pacific Coast Highway and the ocean.

OPPOSITION TO PERMIT—Hearing, June 19, 1979, Los Angeles, CA.

Mr. Chairman and Members of the Commission:

The original roadway on the Rincon between Santa Barbara and Ventura counties was on the wet sand and passable only at low tide. In the early nineteen hundreds (prior to 1915) a road was constructed and improved with wooden causeways.

While our research is by no means complete, there is indication that the mean high tide line was originally about where the north lane of the Pacific Coast Highway now exists. As you recall, the highway at this point runs east—west and the mountains are to the north and the ocean to the south.

The attached pictures show the roadway in the early nineteen hundreds, the roadway which was replaced with what is now known as the Pacific Coast Highway. Later the freeway was constructed north of the highway.

In the process of these changes, over a period of some sixty years, there has grown a mighty wall of houses and fences completely excluding the public from the ocean on more than six miles of the Rincon. It is the purpose of this appeal to determine if this mighty wall is built on public or private lands, and how public access will be restored.

The tiny parks which are suggested, Faria and Hobson, as a fair exchange have nothing to do with the issue of how this massive private development came between the highway and the ocean. Nor are they by any means a fair exchange.

The commission should deny any further permits for development of lands between the highway and the ocean, for construction of any more seawalls which lock out the public, for removal of all unauthorized fencing, and any other obstructions to public access.

The commission should also initiate a long term program to restore the Rincon to its original public character and condition insofar as is possible.

/s/ K. B. Kilbourne

Encl: Exhibit, Views of Rincon.

The pictures of the old highway on the Ricon in Ventura County that are attached to Attachment B appear at page 000181 in the second administrative record.

SURFING
CALIFORNIA

Library of Congress Catalog Number 73-78956

PITAS POINT

John's

Summer lefts off the west end of Pitas Point. Ridable from 2-6 feet, south swells. Medium-low tide. Cobblestone bottom and beach. Enter through Faria Park. *Note:* Camping allowed at this rugged beach park.

Outside's

Strong rights breaking off outer point. Well-shaped lineups with some fast, tubular sections. Takes either a north or west swell. Medium-low tide. Ridable from 2-6 feet. *Note:* Beachfront is private—no direct access. Enter from public beaches to the north or south and walk. *Comments* Well worth the hike.

Insides

Right slides across the inside point. Easy lines that barely break. Works year 'round—summer and winter. Kelp keeps it smooth as glass. A 1-5 foot swell and medium tide are usually unbeatable. *Comment:* One of the best learning spots in Santa Barbara county.

SURFING GUIDE
TO
SOUTHERN CALIFORNIA

Library of Congress Catalog Card No. 63-17835

PITAS POINT—The longest point in Southern California offers three separate spots.

* FATHER JOHN'S (RINCON PARK No. 3)—Left breaks at the west end of the point on a south swell. Camping is allowed here for $1 per car per night.

* MARY'S—Outer part of point produces fast well-shaped but sometimes unmakable rights on strong winter swells; smaller waves break too close to rocks. Private homes line this part of beach.

* MANDO'S—Surf farther inside is most often ridden. Long lines moving in past the mile-long point give up their strength, so that takeoffs over reefs are slow; and though lineups are well-shaped and sometimes even unmakable, they still feel slow. Rights and lefts available, with rights commoner. Small rocks ding boards and surfers. Area takes all swells, but is rarely over 5 feet. Usually glassy, being in lee of point when westerlies blow. Waves break a little harder at medium-to-high tide. This is one of the best learning spots on the coast, due to gentle characteristics of waves, uncrowded conditions, and large space in which people can spread out. Public access from highway at large gap between houses at east end of point is apparently unrestricted.

Area is located 5½ miles north of Ventura.

THE TANK—All of beach between Mando's and Solimar is surfable, but peaks are frequently best in front of small tank between Highway 101 and beach. Local wind swell preferred. Does not blow out easily.

Environmental Defense Center

Public Interest Environmental Law and Education
1005 Santa Barbara St. Santa Barbara, Ca. 93101
(805) 963-1622

May 26, 1983

Mel Nutter
Chairman, California Coastal Commission
631 Howard Street
San Francisco, CA

Re: Application No. 4-82-90 Nollan & Faria Beach Trust

Dear Commissioners,

Three years ago South Central Coast Watch was involved in the Commission's efforts to resolve the public access issue along the Faria Tract. As the commission will recall, property owners objected to the requirement that they offer an easement for public access. An attempt to accomodate landowner concerns was made by the Coastal Commission by allowing the recordation of deed restrictions which recognized the right of the public to walk along the beach seaward of revetments constructed adjacent to houses.

Subsequent to this compromise, the commission and landowners have, on a routine basis, recorded a deed restriction acknowledging the right of the public to pass and repass across the subject property in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end.

In light of the fact that the ocean has moved landward in recent years, allowing the public access along the toe of the seawalls is a minimum requirement for protecting public rights to use the shoreline. We also note that the mean high tide line marking the inland boundary of state lands *at the very least* extends to the toe of the seawall.

We urge the Commission to approve this permit with access conditions.

Sincerely,

/s/Michael David Cox

A project of Santa Barbara Citizens for Environmental Defense, Inc.

Cindy Long
c/o James Ryerson
California Coastal Commission
735 State Street
Suite 616 Balboa Building
Santa Barbara, California 93010

Date: May 25, 1983

File No.:

Lewis Allen, Senior Lands Agent
Office of the Attorney General
Sacramento

Telephone: 324-5570
ATSS: 454-5570

Implied Dedication of Faria Beach

At the request of the Coastal Commission staff, I have conducted an investigation into the existence of a public claim to a right of access across and passive recreational use of the area immediately seaward of the revetments built to protect the Faria Beach community including the area seaward of the revetment protecting the property located at 3822 West Pacific Coast Highway, Faria Beach. I have conducted investigations such as this for the last ten years in my capacity as a Senior Land Agent with the California Department of Justice. Specifically I have been responsible for developing evidence necessary to support the filing of suits by the State where similar public rights existed in other coastal areas of California. In this capacity I have authored a handbook of procedures to be utilized in obtaining evidence necessary to support such suits. As a State Lands Agent I have also worked very closely with the staff of the State Lands Commission where boundary disputes/litigation required my services as a settlement specialist.

Prior to further commentary regarding my conclusions relative to implied dedication, I wish to state that based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls lays below the Mean High Tide Level, and would fall in public domain or sovereign category of ownership. Should a more definitive study concur with my observations, and the *subject* beach area is determined in fact to be sovereign, the question of implied dedication and/or prescriptive easement acquisition benefitting the public becomes mute. In this instance a preliminary study of implied dedication has

been conducted on the hypothesis that the beach was not public property, but privately owned.

Based on my past experience and my investigation to date of this property it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not publicly owned, has been impliedly dedicated to the public for passive recreational use.

In my visits to the area I have interviewed 30 people and to this date have received 18 declarations from users of the beach.[1] In addition those declarants have identified 20 additional regular users of the beach. The individuals to whom I have spoken and the declarants include both surfers and beach hikers and bathers. All these individuals indicated to me that they have used the beach without permission from any of the adjacent owners and have always believed it to be public in nature. In addition they have indicated that they have utilized the beach in good weather year round from 1945 to the present and have observed others using it as well during those periods.

Though I have not obtained any declarations from the Faria Beach residents, my conversations with some of the residents who are members of the homeowners' association, tends to confirm a long history of public use of the area in question as well as suggesting a policy by the Faria Family that such public use should not be interfered with.

In summary, it is again my opinion that the area at issue, if not already publicly owned, has been impliedly dedicated to the public and that any suit brought to judicially ratify its existence would be successful.

Lewis Allen
Senior Lands Agent
Office of the Attorney General
LA/lac

---

1. Copies attached.

The 18 declarations attached hereto, appear at pages 000079 to 000121 in the second administrative record.

VOLUME II

COASTAL ZONE '80

Billy Edge, Editor

THE NETWORKING APPROACH TO COASTAL ZONE MANAGEMENT
by Earl Bradley, Jr. 1504

LOCAL ASSISTANCE: A PROBLEM IN TRANSLATION
by Steven Olsen 1510

TRINIDAD: A SOLUTION FOR COASTAL LAND-USE CONFLICT
by Steele Wotkyns 1518

ECONOMICS OF COASTAL MANAGEMENT
by Kevin C. Smith ..... *

ECOLOGY OF ESTUARINE SYSTEMS & RESTORATION TECHNIQUES

CARBON EXPORT FROM A SOUTH FLORIDA WETLAND AREA
by E. Daddio and J. Van de Kreeke ..... *

SUBMERSED AQUATIC VEGETATION IN THE TIDAL POTOMAC
by Virginia Carter, James E. Paschal and G. Michael Haramis 1537

RIVERINE TRANSPORT OF NUTRIENTS AND DETRITUS TO THE APALACHICOLA BAY ESTUARY, FLORIDA
by John F. Elder and H. C. Mattraw ..... *

SEASONAL WATER CHEMISTRY IN THE TIDAL POTOMAC RIVER
by David H. Peterson 1558

A PLANNING PROCEDURE FOR THE EAST EVERGLADES
by Narendra Juneja 1574

PORT PLANNING AND DEVELOPMENT, II

PORT RECEPTION FACILITIES AND THE COASTAL ZONE
by Henry S. Marcus 1594

MITIGATION OF PORT DEVELOPMENT AT TAMPA, FLORIDA
by William K. Fehring 1608

SWINOMISH CHANNEL DREDGED MATERIAL REUSE STUDY—SKAGIT COUNTY, WASHINGTON
by Howard Hillinger and Terry Stevens ..... *

EUROPEAN DREDGING—A STATE OF THE ART
by John E. Hoffman 1621

INTERAGENCY PERMIT REVIEW—LESSONS OF EXPERIENCE
by Joseph S. LeGath and Robert L. Lippson 1638

PUBLIC ACCESS TO THE SHORE, II

SOUTH PADRE ISLAND COASTAL ZONE MANAGEMENT STUDY
by W. G. Roeseler 1645

THE SAN DIEGO REGIONAL COASTAL ACCESS STUDY
by Dennis Prescott 1662

RACE, INCOME AND ATTITUDE TOWARD BEACH CLEANLINESS
by Charles A. Heatwole and Niels C. West 1684

BEACH ACCESS PROBLEMS PROGRAMS AND PROGRESS
by David Brower 1697

*Papers not available at time of printing

THE SAN DIEGO REGIONAL COASTAL ACCESS STUDY

Dennis A. Prescott

The California Coastal Act of 1976 contains a number of policies which require that current levels of recreational

accessibility to and along the Coastal Zone be maintained or enhanced without implementing new transportation facilities which might cause environmental disruption. The purpose of the San Diego Regional Coastal Access Study was to develop a new element of the Regional Transportation Plan which would assure compliance with this new policy directive.

The study, completed in the fall of 1978, was conducted in three phases. The first phase was designed to obtain information on the conditions and factors affecting regional access to coastal areas. The second phase of the study involved the detailed examination of four case study sites. Each case study site was selected because it offered unique characteristics. The case study approach was selected for the San Diego Regional Coastal Access Study as a means of identifying access problems common to many areas in the Coastal Zone. It also serves as a mechanism for recommending solutions to prototypical coastal transportation problems.

Subsequent to the investigations at each of the case study areas, an analysis was conducted in order to determine the types and magnitudes of recreational access problems for each site. A set of recommendations keyed specifically to those access problems were developed.

PHASE I: DATA BASE DEVELOPMENT

The San Diego region's beaches and climate have been a major influence in its economic and social development. Tourism, drawing on regional, national and even international markets, is the third most important source of income and employment to the region. Furthermore, many

of the area's permanent residents have been attracted to the region because of its excellent natural recreational facilities—a factor that contributes to the above-average participation in recreational activities.

Coastal Resource Areas

For this study, the region was divided into nine zones as shown in Figure 1. Five of these are non-coastal areas which were used to find out where people are coming from when they visit one of the four coastal zones on recreational trips. The number of resource areas and the total amount of annual recreational visitation to each of the coastal zones is as follows:

1. *The North County Coast Zone,* stretching from the Orange County border through Carlsbad, contains three state beaches and six county or local resources that accommodated a total of about 4.3 million visitations in 1976.
2. *The Central County Coast Zone* contains six state and six county recreation facilities that accommodated a total of about 4.5 million visitations in 1976.
3. *The Metropolitan Coast Zone* contains a mix of federal, state, county, city and private recreation attractions that accommodated approximately 18.4 million visitations in 1976.
4. *The South Suburban Coast Zone,* which includes Coronado, Silver Strand State Beach and Imperial Beach, is relatively underutilized in comparison with the coastal areas to the north. The three beach areas received an approximate visitation of 1.3 million in 1976.

The major transportation and urban development corridor in the San Diego region has historically followed the region's coastline. This corridor links the southern international boundary and San Diego, the third largest metropolitan concentration in the state, with the heavily populated Orange County and Los Angeles areas to the north. The only main rail line in the region traverses the length of the region's coastal corridor. The main north-south highway, originally U.S. 101 and subsequently I-5, has always received priority attention for improvement.

Access to most of the Coast Zone involves use of heavily travelled streets that are also used for non-recreational purposes. Most of the main access streets traverse high density residential and commercial land uses, which generate the kinds of traffic that sometimes conflict with recreational access traffic.

Virtually all of the region's coastal resources have some public transit service. The best service, as might be expected, is provided in the Metropolitan Coast Zone where 13 different transit routes link resources with other parts of the metropolitan area. Over half of these routes provide service every day, including holidays.

Recreational Travel by San Diego Residents

The primary source of information on demands for outdoor recreation activities in the San Diego region is the 1975 California Outdoor Recreation Plan. Estimates of recreation demand generated in all parts of the state and the allocation of this demand to zones have been derived by a computer-based model, "Parks and Recreation Information System", or "PARIS".

A regionwide household survey was conducted to develop a generalized picture of San Diego coastal access. The survey provided some baseline data on coastal access travel, as well as some important additional information about why people choose various recreation resources within the region.

Thus, both the recreationists' origins and resource locations were allocated into one of nine zones in the region. Table 1 is a trip table for September, 1977, recreational trips to the Coastal Zone developed out of the data from the household survey. It is probably no surprise that the zone with the largest population, Central City, generated the largest aggregate number of recreational trips. It normally would be expected that the most populous zones would generate the greatest number of trips to recreational resources. However, it would be expected also that zones closer to the coastal area would generate considerably higher coastal trips per capita than inland zones.

TABLE 1

PRESENT MONTHLY RECREATIONAL TRIPS TO COASTAL AREAS

(Thousands of Trips by San Diego Residents)

	Destination Zone				
Zone of Origin	North County Coast	Central County Coast	Metropolitan Coast	South Suburban Coast	Total
1—North County Coast	20	11	4	0	35
2—Central County Coast	4	40	4	0	48

3—Metropolitan Coast	4	22	137	2	165
4—South Suburban Coast	2	13	16	36	67
5—South Suburban	0	0	31	24	55
6—Central City	1	8	199	16	224
7—North City	3	12	145	9	169
8—North County	33	20	22	0	75
9—East County	6	20	137	4	167
TOTAL	73	146	695	91	1,005

Source: Household Survey, September 1977.

Private automobiles, trucks or other recreational vehicles were employed as the mode of access for approximately 80 percent of the total recreational trips to coastal zones. Table 2 shows a breakdown of transportation mode for each of the four recreation zones. The four-zone total column has been normalized so that it adds up to 100 percent. The next highest frequency of modal use is walking, at about 11 percent, followed generally corroborated by the on-site case study survey results.

People who use public transportation for access to coastal recreation areas constitute a minority of recreational participants in the San Diego region. According to the household survey, about four percent of the respondents indicated some use of bus systems for recreational access; a figure of this general magnitude is also confirmed by the on-site case study surveys.

TABLE 2

MODE OF ACCESS

Percent of Respondents Employing Mode

Travel	North County Coast	Central County Coast	Metro-politan Coast	South Sub-burban Coast	Nor-malized Total
Auto, etc.: Drive	60	67	67	74	57
Auto, etc.: Passenger	39	32	33	26	22
Walk	18	13	12	8	11
Bicycle	10	9	8	8	6
Bus	5	2	6	12	4

Source: Household Survey, September 1977.

Table 3 shows selected characteristics of transit riders who used the bus for recreational trips. Compared with the population at large, people who use transit for access to recreational resources are typically very young or very old. The age breakdowns are substantiated by occupational responses, in which almost half of the recreational bus users listed "student" as an occupation, and nine percent were retired. Tourists, at 18 percent, also account for a significant share of bus ridership.

TABLE 3

CHARACTERISTICS OF TRANSIT RIDERS ON RECREATIONAL TRIPS TO COASTAL AREAS

Percent of Respondents

Characteristics		Recreational Trips	All Trips
Age:	24 and Under	71	51
	60 and Over	13	12

Occupation:	Student	45	33
	Retired	9	9
	Armed Forces	6	4
Status:	Tourist/Visitor	18	8
Ownership of Vehicle in Household		78	60

Source: Transit Survey, 1977

Resource Choice Factors

The way in which various people select which coastal recreation resource they will visit is important to any examination of recreational travel behavior. Accordingly, respondents to the household survey were asked to place a judgmental rating of very important, important, not so important or unimportant to a series of factors that influence the resource choice decisions. The responses to these questions are summarized in Table 4. As might be expected, the overall quality of the beach resource, however judged, is the most important factor in choice of recreation resources visited. What might not have been so obvious is that the next three ranking factors all relate more directly to access and transportation than they do to the resource itself. Accessibility questions generally ranked ahead of resource-related factors that normally would be considered to be quite important—availability of recreational facilities, water quality and availability of lifeguard service.

TABLE 4

RECREATIONAL RESOURCE CHOICE FACTORS

(San Diego Residents)

Factor	Importance Ranking (Most Important=100)
Beach Quality	100
Parking Availability	83

Easy to Get to	79
Lack of Traffic Congestion	71
Availability of Public Facilities	66
Availability of Lifeguard Service	60
Water Quality	59
People	53
Familiarity with Beach	40
Availability of Shops and Restaurants	14
Pets Allowed	12

Source: Household Survey, September 1977.

One interpretation of these data is that recreational demand patterns can be altered as much or more by alterations in transportation supply than by alterations in resource supply. These findings also indicate that, to a degree, recreational access problems can be self-correcting or at least self-limiting.

If accessibility and parking availability are as important as indicated by these responses, substantial numbers of recreationists will search for less crowded and more easily accessible resources automatically when their traditional resources are perceived as becoming too crowded or inaccessible.

Future Recreational Travel

According to the demand forecasts provided in the PARIS Model, recreational participation in coastal areas should increase at a compound annual rate of approximately 3.2 percent per year through 1990. Of this total growth, about one third is accounted for by an increase in per capita recreational participation, and the remaining two thirds are accounted for by increased local and regional populations. Under these conditions, total trips to coastal recreation areas during a summer month should increase from 1.00 million in 1977 to 1.55 million in 1995.

Table 5 shows that the highest growth increments and highest growth percentages in recreational trips generally correspond with those zones where total population growth and growth rate are expected to be greatest. In terms of recreational visitation, the Metropolitan Coast remains the biggest recipient of coastal recreation trips in the County; it also shows the greatest absolute gain, at 315,000 trips. The North County Coast will show the highest rate of growth—1995 recreational visitation trips are expected to be more than double the figure for 1977. The Central County Coast will show a relatively high growth rate (80%) and a relatively high absolute growth increment of 116,000. The South Suburban Coast will show a relatively low total increment and a growth rate only slightly above that in Metropolitan Coast.

TABLE 5

MONTHLY RECREATIONAL TRIPS TO COASTAL AREAS IN 1995

(Thousands of Trips by San Diego Residents)

	Destination Zone				
Zone of Origin	North County Coast	Central County Coast	Metro-politan Coast	South Sub-urban Coast	Total
1—North County Coast	39	22	7	0	68
2—Central County Coast	8	88	9	0	105
3—Metropolitan Coast	5	30	188	2	225
4—South Suburban Coast	3	19	23	51	96

5—South Suburban	0	0	54	40	94
6—Central City	1	9	241	20	271
7—North City	5	20	246	15	286
8—North County	78	46	51	1	176
9—East County	8	28	187	6	229
TOTAL	147	262	1,006	135	1,550

Coastal Access Problems

As a result of the Phase I Data Collection activities, a generalized assessment was made of the kinds of transportation problems encountered when one attempts to access coastal resource areas.

The following discussion summarizes the problems that were identified. These problems are grouped into four broad categories: (1) parking, (2) resource area congestion, (3) line-haul congestion, and (4) public transportation. They are discussed below and presented in order of severity for each resource area in Figure 4.

Parking

Inadequate parking is the most frequently observed recreation access deficiency. The result is that visitors to recreation resources park elsewhere. This parking pattern can cause a number of problems:

- o In some cases, recreationists are forced to park in residential or commercial areas. This inflow of recreational parking creates conflicts and competition for limited parking spaces.

  In less developed areas, overflow parking from recreation resources can take the form of unauthorized parking along the side of highway access routes. In some

instances, this type of parking can restrict the capacity of these highways. Also, parking on major access routes can lead to serious safety problems as recreationists attempt to walk along or cross high-speed highways that have no pedestrian facilities. Highway parking also often conflicts with bicycle lanes.

- o Parking that is remote from the resource results in severe inconvenience to recreationists, particularly those who wish to bring recreation equipment as picnic baskets, ice chests and surfboards.

Inability of on-site parking facilities to accommodate peak loads was observed at all of the major recreational resources except for the Silver Strand, Imperial Beach and Solana Beach. Severe peak-period conflicts between recreational parking and commercial/residential parking were observed at Oceanside, Carlsbad, Black's Beach, La Jolla, Pacific Beach and Mission Beach. Cardiff was also cited as a severe problem, primarily because of extensive use of the Pacific Coast Highway for parking. Occasional or moderate parking problems were observed at Leucadia, Encinitas, Del Mar Beach, Torrey Pines, Mission Bay, Ocean Beach, Point Loma and Coronado.

Resource Area Congestion

Vehicular traffic caused by people who are coming to or from recreation areas, or searching for off-site parking spaces, can often result in serious congestion of streets used for internal circulation within recreational zones. This problem is particularly severe when the same street

network is used to accommodate high volumes of recreational traffic as well as traffic generated by local residents and local commercial/retail activities.

Severe resource area congestion of this type was noted at Oceanside, La Jolla, Pacific Beach, Mission Beach and

SAN DIEGO ACCESS STUDY

FIGURE 4

COASTAL ACCESS STUDY
RECREATION ACCESS PROBLEMS: 1977

	Severity of Access Problem			
Resource	Inadequate Parking	Resource-Area Congestion	Line-Haul Congestion	Inadequate Public Transportation
Oceanside	●	●	◉	○
Carlsbad	●	◉	○	○
Leucadia	◉	◉	○	◉
Encinitas	◉	◉	○	◉
Cardiff	●	○	○	◉
Solana Beach	○	○	○	◉
Del Mar Beach	◉	○	◉	◉
Del Mar Fairgrounds	◉	●	●	◉
Torrey Pines	◉	○	○	●
Black's Beach	●	◉	◉	●
La Jolla	●	●	●	○
Pacific Beach	●	●	●	○
Mission Beach	●	●	●	○
Mission Bay	◉	●	◉	○
Ocean Beach	◉	◉	◉	◉
Point Loma	◉	◉	◉	○
Coronado	◉	○	○	◉
Silver Strand	○	○	○	●
Imperial Beach	○	○	○	●

● Severe or Frequent Problems
◉ Moderate or Occasional Problems
○ No Problems or Minor Problems

Mission Bay. In all of these cases, streets used for recreation circulation are also heavily used for other types of local and/or through traffic. The problem is particularly acute in La Jolla, Pacific Beach, Mission Beach and Mission Bay areas, where the roads used for internal recreation traffic circulation are also heavily used for urban through traffic and for local shopping trips.

Resource area traffic congestion was also noted near Del Mar Fairgrounds. Here, the problem is aggravated by the severe peaking associated with the opening and closing times of the special events held at the fairgrounds. Modest or infrequent resource area congestion was noted in Carlsbad, Leucadia, Encinitas, Ocean Beach, Point Loma and Blacks Beach.

External Access Congestion

Major arterial highways that connect recreational zones with residential zones are congested by recreation traffic less frequently than local roads within recreation areas. Nevertheless, recreational traffic occasionally can become sufficiently great enough to congest even high capacity arterial highways.

The most notable example of external access or line-haul congestion was near the Del Mar Fairgrounds where significant traffic on Interstate 5 was observed at the major off-ramp. Similar congestion was noted in La Jolla, Pacific Beach and Mission Beach because, in these areas, the major external access routes are also used for internal circulation traffic.

In general, with its excellent high-capacity interstate highway system, the San Diego region is less susceptible to line-haul congestion than many other parts of the country.

Still, modest or occasional congestion problems were observed in Oceanside, Del Mar Beach, Mission Bay, Ocean Beach, Point Loma and Blacks Beach.

Public Transportation

Public transportation was considered to be inadequate when the following conditions were encountered:

- Service frequencies were less than two buses per hour.
- One or more transfers were required for a trip from residential areas to recreation resources.
- Public transportation was overcrowded and unpleasant for recreational trips.

Torrey Pines, Silver Strand, Imperial Beach and Blacks Beach were found to be the most inadequately served by public transportation at the present time. In the case of Torrey Pines, there is no provision for a stop to serve recreational traffic, even though service passes near the beach. Except for residents in the immediate vicinty, recreationists would have to transfer at least once to reach Silver or Imperial Beach by public transportation.

In general, the coastal area from Leucadia to Del Mar was found to have only moderately useful public transportation for recreational purposes. The bus routes serving this area run north-south, essentially interconnecting the various resources rather than connecting resources with residential areas.

The best public transportation services were observed in the heavily urbanized La Jolla, Pacific Beach, Mission Beach, Mission Bay and Point Loma areas. Transportation was also good in Oceanside and Carlsbad. In all of

these areas, adequacy is based on a route structure that tends to link residential areas with coastal recreation areas. Even in these cases, however, the reduction of public transit service on weekends resulted in many instances of buses being uncomfortably crowded by recreational traffic during peak weekend periods.

PHASE II: THE CASE STUDY PROCESS

The case study approach was selected for the San Diego Regional Coastal Access Study as a means of identifying access problems common to representative areas in the Coastal Zone and as mechanism for recommending solutions to prototypical coastal transportation problems.

The case study portion of the project was structured in several work elements. The first task included the selection of specific resources within the San Diego Coastal Zone to be utilized as case study areas. This process included participation by the Coastal Access Study Committee. As an outcome of the case study selection process, the following resource areas within the Coastal Zone were selected for detailed, on-site study:

- Mission Bay-Mission Beach
- Del Mar Fairgrounds
- Cardiff
- Imperial Beach-Silver Strand

Once the case study areas were determined, a study program was established for each specific resource, designed to investigate current use, physical attributes and other characteristics of the case study area. On-site surveys were used to collect data on travel characteristics and attitudes of visitors.

Problem Identification

The primary methodology for identifying problems followed the same basic format at each of the case study locations. The first step was the identification of existing conditions and patterns of use. This phase included a series of on-site research activities at each case study resource aimed at fully documenting the existing situation in terms of physical characteristics and patterns of use. Questionnaires were administered on peak-use weekends during the summer of 1977 to determine visitors' attitudes, visitation patterns, reactions to transportation conditions, party composition, activities pursued, primary and secondary origins and associated demographic data. Concurrently, license plate surveys were conducted to further verify the origin distribution of visitors to case study resources.

Data collected at the case study resources were analyzed and evaluated to develop a rational listing and prioritization of problems. Observed problems at each site were classified into the same four major problem areas used during the first phase of the study. These are as follows:

- Parking
- Internal Circulation
- Line-Haul (External) Access
- Public Transit

These four problem areas were used to structure the potential improvement measures for each of the case study sites. They also allow for the development of prototypical regional improvement strategies.

CARDIFF CASE STUDY SITE

Cardiff was the first case study site. It stretches three miles along the Central County Coast. Four major coastal recreational resources are located in the case study site. Close to one million visits per year come to these sites. There is a small commercial-tourist center in the central part of the town.

Usage patterns were determined through license plate and on-site interview surveys. The largest number of visitors to Cardiff came from immediately adjacent Central County Coast. A substantial number of visitors came from the North County and North City areas. Out-of-county use accounted for slightly less than one fourth of the total. This is consistent with the findings at Del Mar and Mission Beach.

Approximately half of the people arrived between 11:00 a.m. and 1:00 p.m. The automobile was used by 80 percent of the respondents. Walking proved to be the only other major mode of access, with 5.9 percent of those surveyed walking to the beach. The average vehicle occupancy was 3.1 persons per vehicle. This compares to an overall weekday vehicle occupancy of 1.5 persons per vehicle. Approximately 90 percent of the respondents parked less than 1,000 feet from the beach, and over half of them parked within 100 feet. Numerous persons noted that as parking facilities filled, they would continue to drive until they found a beach with parking available.

Observed Problems

The major recreation access problems observed at the Cardiff case study site involved parking. Several specific parking and access problems were encountered:

- There is extensive parking on the shoulder of the major coastal highway. This results in some potentially serious safety problems for pedestrians and bicyclists travelling along and crossing an unprotected, high-speed highway.
- There is limited on-site parking at the coastal beaches.
- The configuration of the parking facilities at some beaches does not lend itself to the maximum, most efficient use of the available facilities.
- The major internal circulation problem at the Cardiff relates to the lack of traffic regulation to and from the beach parking lots.
- There is no Sunday or holiday public transportation on the east-west transit routes in the vicinity.

DEL MAR CASE STUDY SITE

The Del Mar case study site was selected as representative of a special event area with high levels of visitation. The Southern California Exposition and the Del Mar Racetrack are the most popular of the special events. The fairgrounds is situated on a 200-acre triangular piece of land bounded by a five-point intersection northeast of the fairgrounds. Interstate 5, the major north-south interstate freeway, is included in the intersection.

There are 8,000 on-site parking spaces and 3,200 unpaved overflow parking spaces at the resource. Trams are used to transport people between the parking areas and the fairgrounds entrance.

Del Mar is one of the three scheduled AMTRAK stops in the San Diego region. There are six trains in each direction daily to San Diego and Los Angeles from Del Mar.

Usage Patterns

Surveys were performed during the Southern California Exposition to determine usage patterns. Approximately 83 percent of the people surveyed were residents of the San Diego region. East County generated approximately 25 percent of the people surveyed.

More than 95 percent of those surveyed responded that they used a car, truck, or camper to access the site. Only two percent of the respondents used public transit. As in Cardiff, the use of private vehicles was reasonably efficient; average vehicle occupancy was 3.6 persons per vehicle.

Observed Problems

The types of problems found at Del Mar consist mainly of traffic congestion on arterial highways leading to and from the event. Occasionally, there is inadequate parking and traffic congestion on the interchanges and roads linking the main access highways with the parking lots. The main transit difficulty arises because San Diego Transit's authority terminates almost two miles south of the fairgrounds complex.

MISSION BEACH CASE STUDY SITE

Mission Beach and Mission Bay Park are centered in a heavily urbanized environment. As a planned recreation and tourism center, Mission Bay Park includes extensive commercial hotel and tourist attractions. The areas immediately adjacent to Mission Beach are also major visitor attractions.

The street network in Mission Beach is comprised of only one major north-south areterial. The rest of the system is

basically a grid network of alleyways, which are also used heavily for parking. As a comparatively new and large-scale master plan development, Mission Bay Park incorporates numerous on-site parking spaces. The case study site is well-served by public transit routes. This is not surprising in view of the fact that these areas are within a highly developed metropolitan complex. There is an extensive bicycle route system in the area.

Usage Patterns

Slightly over one quarter of the visitors were from the Metropolitan Coast Area, in which Mission Beach and Mission Bay are located. More than 12 percent of the visitors were from out-of-state and an additional two percent were foreign visitors. Of the people who drove to Mission Beach, 24.4 percent are not San Diego County residents.

As in Cardiff, approximately half of the people arrived between 11:00 in the morning and 1:00 in the afternoon. Fewer than 70 percent of the visitors access the site by car, truck or camper. Almost one quarter of the respondents walked or skated to reach the site. Twice as many people rode bicycles than arrived by bus.

Almost 90 percent of those people who walked to the beach indicated a distant residence: East County and out-of-county. Higher percentages of visitors had to park at greater distances than at other case study sites. Almost 20 percent of the respondents parked more than 500 feet away. Among those who used an automobile, the occupancy was 3.0 persons per vehicle. The reason that people did not use the bus was due to the convenience of the auto.

Observed Problems

Extensive and severe parking problems were found at the Mission Beach-Mission Bay case study area. Limited parking is available on the ocean side of Mission Beach, and there is a great deal of competition among recreationists, residents and patrons of local businesses for the available on-street parking spaces.

Peak-period resource-area traffic congestion was observed. One reason for this congestion is the simple fact that these highways are required to perform double duty as both line-haul and internal transportation links for both local and recreational traffic. The congestion problems are also compounded by parking. A significant portion of the local traffic consists of automobiles driving around in search of parking places. Cars will often block one or two available lanes in ether direction for considerable periods of time while a driver waits for another party to enter and load a parked car and then vacate a space.

The major problem with public transit is that, even though buses account for a small percentage of total access volume, the buses that operate during peak recreational periods are frequently more overcrowded than the buses that operate during commute peak hours.

The Mission Beach/Mission Bay area represents the most severe coastal access problems. With the anticipated minimum growth of 45 percent and a possible doubling of visitation by 1995, these problems will become worse.

SILVER STRAND-IMPERIAL BEACH CASE STUDY SITE

The Silver Strand and Imperial Beach case study site is situated in the southwest corner of the San Diego region.

Located in this study site are some of the most underutilized beach resources in a major urban area. The Silver Strand-Imperial Beach case study area extends from the south boundary of the Naval Amphibious Training Center to the south end of Imperial Beach.

Transit service to the case study area is limited. Only recently was weekend transit service along the Silver Strand provided. There is transit service to Imperial Beach from downtown San Diego and Otay Mesa. The San Diego Bay Route Bikeway is approximately 23 miles and produces a complete circuit around San Diego Bay. San Diego Transit buses serving Route 9 on the San Diego-Coronado Bridge are equipped with bicycle racks, and enhances the use of bicycles as an alternative mode of travel.

The Silver Strand beach facilities are immediately adjacent to Silver Strand Boulevard. Imperial Beach and the fishing pier are at the west end of Palm Avenue. Both major resource concentrations are somewhat isolated from the rest of the County and its major population center. The Coronado Bridge constitutes a financial barrier to the Silver Strand. The Coronado central business district constitutes a traffic barrier. Alternate access to Coronado through Imperial Beach involves considerable driving distance from all zones except South Suburban Coast and South Suburban.

Usage Patterns

Use of Silver Strand-Imperial Beach resources is heavily concentrated among residents of the South County. Well over half of the visitors lived in the South Suburban and South Burban Coast Zones. Use of these resources by out-of-county visitors is less than the other three case study areas.

Observed Problems

The significant access problem observed was the relative isolation of Silver Strand due to topography and the resultant requirement that traffic cross the Coronado Bridge and then pass through the Coronado central business district to reach the State beach. There are also financial barriers that create access problems. The overall transit service to this case study site is much less than the service offered to other coastal areas. The highway system appears to have ample capacity to accommodate the rather modest 49 percent growth forecast through 1995. The resources would be capable of accommodating greater numbers of visitors.

PHASE III: IDENTIFICATION OF PROTOTYPICAL SOLUTIONS

This section utilizes the work from the case studies to identify prototypical solutions to the types of coastal access problems that were found. Urbanized areas are discussed first using the Mission Beach-Mission Bay case study site as the basis for developing the prototypical solutions. Both the Cardiff and Imperial Beach-Silver Strand case study sites are applied to a discussion of non-urbanized areas. Finally, special events are discussed based upon the Del Mar case study.

Urbanized Areas

The Mission Beach-Mission Bay case study site was selected to represent the region's coastal areas that are located within urbanized areas. Many of the region's urban areas are located along the coast.

The problem found in the urbanized areas include congestion of roads, the use of the same highway system for both internal circulation and line-haul access, and insufficient parking. While urbanized recreational areas generally are accessible to transit service, transit is primarily optimized for work trips rather than for recreational trips. Moreover, buses have to use the same street network as private vehicles and are severely impacted by traffic congestion. Transit use is also complicated for beach users bringing bulky equipment.

Improved traffic control measures appear to be the most useful technique for making improvements in urban areas. Traffic congestion can be decreased by left-turn limitations and selected regulation or removal of parking spaces from heavily travelled roads. The provision of preferential treatment for transit vehicles, the development of special pick-up and drop-off zones and the establishment of special regulations for large recreational vehicles can also relieve congestion. These traffic control measures may require highway improvements such as the construction of left-turn pockets, minor shifts in traffic lanes, and improved signing. This type of solution can only be marginally useful in improving the worst local traffic problems. The basic problems are caused by the presence of more private motor vehicles than can be adequately handled by the highway system and parking facilities. The provision of additional parking spaces would relieve the confliet between local traffic and recreationists competing for available street parking. This would have a positive effect on reducing traffic congestion.

For these reasons, long-term improvements in traffic problems in the urbanized coastal areas will require some

shifting of traffic from private vehicles to transit. Park-and-ride services can be developed from available parking areas. Transit services to park-and-ride terminals can be operated using some existing routes. It will probably also be necessary to reroute and reschedule some weekend transit services to optimize service for recreationists. In addition, some form of vehicle modification to accommodate recreational equipment may be necessary.

Land use control is also a critical element of any long-term strategy for improving coastal access problems in urbanized areas. Land use controls should require adequate provisions for off-street parking for residential and commercial developments. Careful consideration will have to be given to total permissible residential and commercial densities in some of the coastal areas.

The capacity of heavily-used coastal areas is often limited by the ability of the area to accommodate automobiles rather than by the ability to accommodate people. This would suggest that growth in recreational residential and commercial activities could be accommodated in coastal areas if they were tied to non-automotive transportation systems. However, it is difficult to implement this type of development.

Non-Urbanized Areas

The Cardiff case study area was chosen to reflect the residential access problems associated with a series of North County coastal resources that are comparatively undeveloped and non-urbanized. It is also an area of the county expected to show the highest growth in population and recreational demand over the next 20 years.

The Imperial Beach-Silver Strand case study site was selected as a coastal area currently experiencing low recreational demand. This case study represents a non-urbanized area which can accommodate future recreational demand.

The problems in these areas are normally related to relatively inefficient use of resources. Parking is a problem due to poor organization of existing parking areas, lack of adequate on-site facilities and inconsistent parking fees. Traffic problems involve safety hazards, inconveniences and intermodal conflicts. Transit services are minimal, even when provided.

Relatively minor traffic engineering improvements can provide most of the improvements needed for the problems observed. Traffic signals can be installed to eliminate pedestrian safety hazards and to smooth traffic flows in and out of major recreational areas and parking lots. Left-turn pockets or lanes on the main access roads can be used to eliminate hazards and traffic inconveniences. Parking capacities can be increased by paving and striping existing parking areas. Intermodal conflicts can be eased by provision of separate pedestrian, vehicle and bicycle lanes. Improved signing can improve the flow of all modes of traffic. These relatively inexpensive improvements could solve many of the problems at comparable coastal resources in the North County.

North County coastal areas such as Cardiff will show the highest growth in recreational use. Use will more than double at some of them within the next 20 years. Under these circumstances, traffic engineering solutions alone may be insufficient to accommodate growth in the long term.

Accordingly, some considerations will have to be given to somewhat more extensive projects. For example, too much space immediately adjacent to the beach is probably dedicated to parking today in the Cardiff area and in comparable recreation areas. As the demand increases, it would be highly desirable to remove parking from areas immediately adjacent to the beach and to construct parking facilities on the eastern side of the major north and south highway.

Some consideration for increased use of public transit is also warranted in these areas. Transit operators should start considering potential future recreational traffic in its route planning and equipment acquisition plans.

Appropriate land use control strategies for commercial development should be implemented to minimize future coastal access problems before they develop. New commercial developments on or near the beach should be reviewed carefully in terms of trip generation and attraction. Provision of adequate off-street parking should be assured.

Visitors often drive great distances to reach the Imperial Beach-Silver Strand case study site. These visitors have the option of approaching the site via the Coronado-San Diego Bridge or by travelling around the south end of San Diego Bay. Those using the bridge must pay a toll. At the site there are additional barriers: Imperial Beach parking lots have parking meters; Silver Strand State Beach charges an entry fee. Transit service is minimal. There is no weekend or holiday service to the Silver Strand and only limited service to Imperial Beach.

Improved transit service directly to these underutilized sites in non-urbanized areas from major population centers

in the San Diego region would be beneficial. A strategy to allow admittance to Silver Strand State Beach and other resources that charge user fees by showing a transfer slip would increase facility and transit usage. Transit service should be coordinated with bicycle paths and routes in the area. Recreational equipment storage and bicycle storage facilities should be installed.

Marketing and communications should be implemented to make beach users aware of the recreational resources available at low demand areas. Public service messages, beach reports and improved signing should be used to increase public awareness of these areas.

Special Events Sites

The Del Mar Fairgrounds and Racetrack was chosen as a case study to represent a number of sites within the region at which special recreational or tourist events take place. Although the Del Mar Fair is undoubtedly the largest traffic generator of special event traffic within the region, a large number of other public and private attractions exhibit the same types of characteristics.

The type of problems found at Del Mar and at other special event sites consists mainly of traffic congestion on arterial highway leading to and from the event, occasionally inadequate parking and traffic congestion on the interchanges and roads linking the main access highways with the special event parking lots.

Access to special events lends itself to the use of public transit better than any other category of recreational participation. Participants tend not to be encumbered by bulky recreational equipment. From a transit standpoint.

the concentration of total demand into a fairly short time period and to a single destination site makes public transportation considerably more efficient and easy to schedule than for the more dispersed beach areas. The high efficiency of transit vehicles can be used to minimize traffic congestion both on traffic arterials and in the immediate vicinity of the recreational site. Specific improvements to transit services would include additional direct service to special event sites, including possibly express service on existing routes and routes linking special event sites with available remote parking lots. Service could be improved through preferential treatment for transit vehicles at or near the site of major special events. Finally, parking and admission charges might be adjusted to provide more economic incentives for the use of transit.

Enhanced use of transit services might require some minor traffic engineering improvements. Special access, lanes for transit vehicles might be required. These could be developed either by segregation of existing traffic lanes or by widening certain highway links. Traffic congestion is normally due to relatively short, concentrated bottlenecks. Thus, providing a second lane on off-ramps, widening of short stretches of access highways, improved intersection design and giving priority to transit vehicles might alleviate some of the more severe special event traffic congestion.

Traffic control measures may also be used to ease highly congested areas. Coordinated manual traffic control is probably more effective at special event sites than in any other traffic situation.

Special event parking fees are frequently collected from the motorists as they enter the parking lot which slows

down the flow of traffic. Problems resulting from this practice could be solved by collecting the parking fees either as part of the total admission charge or by having people pay the fees on their way out of the special event.

Long-term improvements in access to special event sites may require some more extensive traffic engineering projects. Special off-ramps, new highway interchanges, or widening of access lanes may be required to handle increased traffic volumes. These solutions are most useful when applied to locations that are used for a series of special events throughout the year.

BIBLIOGRAPHY

California Coastal Act of 1976, SB 1277, as amended by AB 2948.

California Coastal Commission, California Coastal Plan, Sacramento, California, December 1975.

California Coastal Zone Conservation Act, California Public Resources Code, Secs. 27000-27650.

California Department of Parks and Recreation, *California Outdoor Recreation Resources Plan*, Sacramento, California, February 1974.

California Department of Parks and Recreation, "PARIS-Park and Recreation Information System", Sacramento, California, November 1966.

City of Carlsbad, *General Plan*, Carlsbad, California, August 1975.

City of Chula Vista Planning Department, *Revision of Chula Vista General Plan: 1990*, Chula Vista, California, March 1970.

City of Coronado, Citizens' General Plan Advisory Committee and Gruen Associates, *Coronado—1990 The General Plan*, San Diego, California (undated).

City of Del Mar, *General Plan 1990*, Del Mar, California May 1975.

City of Imperial Beach, *General Plan 1990*, Imperial Beach California, 1968.

City of National City, *General Plan*, National City, California, September 1974.

City of Oceanside, *Beach Parking Study*, Oceanside, California, April 1974.

City of San Diego, *Mission Beach Precise Plan*, San Diego, California, April 1974.

Coastal Zone Management Act of 1972 (P.C. 92-583), amended Coastal Zone Management Act Amendments of 1976 (P.L. 94-370).

Comprehensive Planning Organization of the San Diego Region, *San Diego Regional Coastal Access Study, Phase I—Working Paper*, San Diego, California, January 1978.

Comprehensive Planning Organization of the San Diego Region, *San Diego Regional Coastal Access Study, Phase II—Case Studies*, San Diego, California, April 1978.

San Diego County Planning Commission, *San Diego County General Plan*, San Diego, California, December 15, 1967.

VOLUME II

COASTAL ZONE '80

Billy Edge, Editor

THE NETWORKING APPROACH TO COASTAL ZONE MANAGEMENT
by Earl Bradley, Jr. 1504

LOCAL ASSISTANCE: A PROBLEM IN TRANSLATION
by Steven Olsen 1510

TRINIDAD: A SOLUTION FOR COASTAL LAND-USE CONFLICT
by Steele Wotkyns 1518

ECONOMICS OF COASTAL MANAGEMENT
by Kevin C. Smith .....

ECOLOGY OF ESTUARINE SYSTEMS & RESTORATION TECHNIQUES

CARBON EXPORT FROM A SOUTH FLORIDA WETLAND AREA
by E. Daddio and J. Van de Kreeke .....

SUBMERSED AQUATIC VEGETATION IN THE TIDAL POTOMAC
by Virginia Carter, James E. Paschal and G. Michael Haramis 1537

RIVERINE TRANSPORT OF NUTRIENTS AND DETRITUS TO THE APALACHICOLA BAY ESTUARY, FLORIDA
by John F. Elder and H. C. Mattraw .....

SEASONAL WATER CHEMISTRY IN THE TIDAL POTOMAC RIVER
by David H. Peterson 1558

A PLANNING PROCEDURE FOR THE EAST EVERGLADES
by Narendra Juneja 1574

PORT PLANNING AND DEVELOPMENT, II

PORT RECEPTION FACILITIES AND THE COASTAL ZONE
by Henry S. Marcus 1594

MITIGATION OF PORT DEVELOPMENT AT TAMPA, FLORIDA
by William K. Fehring 1608

SWINOMISH CHANNEL DREDGED MATERIAL REUSE STUDY — SKAGIT COUNTY, WASHINGTON
by Howard Hillinger and Terry Stevens ..... *

EUROPEAN DREDGING — A STATE OF THE ART
by John F. Hoffman 1621

INTERAGENCY PERMIT REVIEW—LESSONS OF EXPERIENCE
by Joseph S. Legath and Robert L. Lippson 1638

PUBLIC ACCESS TO THE SHORE, II

SOUTH PADRE ISLAND COASTAL ZONE MANAGEMENT STUDY
by W. G. Roesler 1645

THE SAN DIEGO REGIONAL COASTAL ACCESS STUDY
by Dennis Prescott 1662

RACE, INCOME AND ATTITUDE TOWARD BEACH CLEANLINESS
by Charles A. Heatwole and Niels C. West 1684

BEACH ACCESS PROBLEMS PROGRAMS AND PROGRESS
by David Brower 1697

---

*Papers not available at the time of printing.

Introduction

Beach Access Problems, Programs and Progress
David J. Brower
Associate Director
The Center for Urban and Regional Studies
The University of North Carolina at Chapel Hill
Chapel Hill, North Carolina

Man throughout history has been drawn to the coast. The coast has been and continues to be a source of replenishment for mind, body and spirit in all cultures. In this country where the amount of disposable income and time is rapidly increasing, water related recreational activity continues to be the most popular form of outdoor recreation. The notion of simply "going to the beach" is still one of the most popular outdoor pastimes. But going to the beach is not what it once was. It used to involve quietly lying in the sun, peaceful picnics, beach grass blowing in the breeze, the cry of gulls, long, isolated walks. But now "going to the beach" often involves long lines of hot station wagons filled with grouchy parents, sullen children, and soggy sandwiches trying to get to a crowded beach filled with bodies, beer cans, styrofoam and stereos. In the process the beach-goers run the danger of conflict with hostile residents, defensive land owners and local governments who regard the beach as "theirs." For many, going to the beach has become unpleasant: for others, impossible.

As the popularity of coastal areas of this country increases, development in the coastal areas also increases to take advantage of that popularity. As development increases to meet increased demand, the supply decreases, and quite according to economic theory the price increases. The result is that the coast is becoming increasingly the haven for only upper income people. It is only the upper income groups who can afford the facilities, such as a motel room, a cottage, or a condominium, to assure that going to the beach is a real possibility.

The argument for a strong public policy encouraging public access to the nation's beaches is a simple one. There has always been a strong demand for the use of beaches, and that demand is increasing and will continue to increase for some time to come. The public now owns and/or has the right to use vast stretches of the coast. The problem is that often there is no way for the public to get to those portions of the coast that they have the right to use because it is separated from the nearest public road by privately owned land. The result is that many stretches of public beach are accessible only by long hikes, by boat or by trespassing on private land. This problem is becoming increasingly intense because private land that has been traditionally used by the public is being converted to more profitable uses by the owners, and in some cases accessways that have been dedicated to the public are being withdrawn. Unless there is a strong public policy to obtain new accessways and to protect existing ones, the amount of beach available to the public use will continue to decrease at the same time the demand for it is increasing.

There are two separate questions involved. The first, does the public have the right to use the beach? Then, if the public does in fact have the right to use the beach how can the public get to the beach? It is the latter question that is the real "beach access" question.

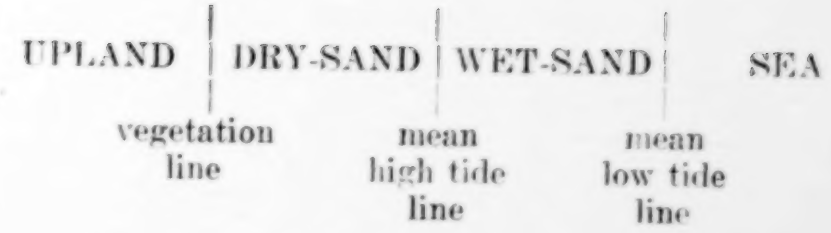
The paper will first explore the legal questions of beach ownership and of accessways to the beach. Then it will discuss the beach access requirements of the federal Coastal Zone Management Program and will conclude by describing eight state beach access programs and how they have responded to the federal program.

The Legal Right Of The Public To Use The Nation's Beaches

Can the owners of a coastal motel fence off the beach in front of the motel and reserve it for the exclusive use of motel guests? Can the public fish from the surf anywhere they want? Or use any beach for swimming, sunbathing, or picnicking? Supposing that they do have the right to use the beach, how can they get to it? To what extent can owners of water front cottages prohibit anyone from sitting on "their" beach or walking across their property to get to the beach?

These questions raise the issue of who owns the beach, and to what extent the public has a legal right to use the beach, and to gain access to it. The answers to these questions are based on sometimes complex legal issues and doctrines.

For the purposes of this discussion, the "beach" consists of four parts: the sea, the wet-sand, the dry-sand, and the upland. First, that area seaward of the mean low tide line is termed the sea, or sea-bed (lake or lake bed in non-oceanic situations). Second, the area between the mean low tide and mean high tide lines, which is covered by the usual flow of tides, is termed the wet-sand. "Foreshore" and "tideland" are generally synonymous with this term. Third, the area between the mean high tide line and the line of vegetation, or dune line, an area inundated only during severe storms, is termed the dry-sand. Fourth, that area landward of the vegetation line is termed the upland. The following diagram illustrates this division.



The question of the extent to which the public has the right to use coastal beaches has come before the courts on several occasions. Major cases have been decided in New Jersey, California, New York, Oregon, Florida, and Texas. Each of these cases involved different factual situations and different aspects of the beach use and access questions. Each decision was also based on different legal theories.

The Sea

American courts have held consistently that navigable waters and associated tidelands are held in trust by the government for the public. In the leading case on this point, the U.S. Supreme Court in 1892 said that these lands are held in trust for the people so that public rights of navigation, fishing, and commerce could be preserved. The court further said that the state could not abdicate its control over these areas in any fashion that would diminish the public's right in the trust lands.

The Wet-Sand

As the following chart indicates, approximately three-fourths of the oceanic states have held that wet-sand beaches are publicly owned:

Publicly Owned		Privately Owned
Alabama	New Jersey	Delaware
Alaska	New York	Maine
California	North Carolina	Massachusetts
Florida	Oregon	New Hampshire
Georgia	Rhode Island	Pennsylvania
Hawaii	South Carolina	Virginia
Louisiana	Texas	
Maryland	Washington	
Mississippi		

In most of these states, the public ownership of the wet-sand beaches is subject to a "public trust."

The Dry-Sand

In almost all states the dry-sand is privately owned but in a number of states the courts have used a variety of theories or concepts to find public ownership or a public right to use the dry-sand portions of the beach:

Public Trust: Avon is a small resort community in New Jersey bordering the Atlantic. The city owned a dry-sand beach that for many years was free to all comers. In the 1950s, the New Jersey legislature allowed cities to start collecting user fees for the beaches to defray maintenance costs. Avon established such a fee, which was the same for residents and non-residents. In 1970, Avon changed their beach fee ordinance so that it would charge non-residents about twice as much as residents to use the beach. Neptune City, a neighboring inland city, brought suit to challenge this change in the ordinance.

The court invalidated the ordinance. They said that where a municipality owns a dry-sand beach and dedicates it to public beach purposes, the public trust doctrine requires the beach to be open to all on equal terms. So

while New Jersey cities could charge reasonable user fees, they may not discriminate between residents and non-residents.

Implied Dedication: In 1970 the California Supreme Court found that the public had a right to use two privately owned beaches.

The court said that when the public has used a beach for a long period of time, paying no attention to the fact that the beach is privately owned, the public acquires a legal right to use that beach. Unlike the common notion of "express dedication," where the private owner overtly conveys land to the public and the public body formally accepts the dedication, there are no formalities required for "implied dedications." The owner's intent to give the land to the public is implied from his conduct of not preventing public use of the beach. And the public's acceptance of the dedication is implied from public use of the beach.

Customary Rights: In 1969, the Oregon Supreme Court in *Thornton v. Hay,* employed the legal doctrine of "customary rights" to confirm the right of the public to use Oregon's dry-sand beaches.

This case involved the efforts of Hay, a motel owner, to fence in a portion of the dry-sand beach adjacent to his motel for the exclusive use of motel guests. The publicity generated by this action helped trigger legislation recognizing the public's right to use the dry-sand beaches of the state. However, since legislation of this sort cannot change or determine property rights, the matter of Hay's fence was sure to wind up in court.

And wind up in court it did when, after a winter storm destroyed his fence, Hay replaced it without obtaining a permit required by the legislation. The state went to court seeking an order to force Hay to remove the fence.

In reviewing Hay's claim of a right to exclude the public from this dry-sand area, the Oregon court noted that the public had been freely using the state's dry-sand beaches as if they belonged to the public for over sixty years. At no time had anyone sought or obtained the upland owner's permission to use the dry-sand area. Virtually everyone, including the upland owners, had always assumed that the public had a right to use the dry-sand area. For these reasons, the court held that the public had obtained the right to continue to use the dry-sand beach.

Prescriptive Easements: If it is found that the public has acquired a prescriptive easement for the use of a specific beach area, then the public has a right to continue to use the area in the same fashion as before. What had started out as a trespass becomes, when enough time passes without the owner evicting the trespassers, a legal right to use the beach. The owner still "owns" the property, but cannot do anything on it that would reduce the public's established rights to use it.

The Upland

In all states, the upland, that area above the vegetation or dune line, is privately owned with the exception of land acquired by the public. Many of the "adverse possession" doctrines applied to the dry-sand portion of beach have been applied and are available to be applied to

the upland portions of the beach as well. Indeed many of the cases referred to in the Dry-Sand section dealt with public rights in the upland as well as in the dry-sand areas.

Typically, however, public rights in the upland portion of the beach are obtained through some sort of acquisition program. The National Seashores and the many state and local parks that are found on the coast are the product of these programs. A few states (Oregon, Rhode Island and California) have been especially active while others have done very little.

From this description it can be seen that vast portions of the nation's beaches are owned by the public and/or the public has the right to use them. The pattern of public rights varies from state to state. In some states, the public owns only the sea, in some they own from the vegetation line seaward, but in all states, the public does have the right to use some portion of the beach even if it is only the land below the water which can be used only by wading.

The Great Lakes

While the Great Lakes are technically "inland lakes" rather than oceans, their shorelands share many of the attributes and problems of oceanic coasts. Some of the areas have a number of the physical characteristics of ocean beaches; many areas are also increasingly being faced with the same public versus private use conflicts that led to the litigation discussed earlier.

Over the years, state and federal courts have developed the strong position that the states must manage the

Great Lakes in a fashion to benefit all residents of the state; that the Great Lakes are a public resource that cannot be appropriated for private gain or use. In fact, the U.S. Supreme Court's landmark decision on the public trust doctrine, *Illinois Central R.R. v. Illinois,* set aside an attempt of the Illinois legislature to convey part of the lake bed of Lake Michigan. However, as is the case in many oceanic states, this doctrine has generally been interpreted only to protect public rights lakeward of the "ordinary high water mark."

What Can Be Done About Access?

Concern about the ability of the public to have access to the coast and to make use of the coastal beaches is by no means a new issue. The public trust doctrine was developed by the Romans in part to ensure that the public could make use of the shore. The public trust doctrine was incorporated into English law, brought to the colonies and later adopted by the United States. In Hawaii, a system of trails leading to and along the coast, that under tribal law could be used by all of the people, led to what is now known as the "Ancient Trails Doctrine." In 1959 the Texas legislature adopted the Texas Open Beaches Act which was passed after private landowners attempted to close some Galveston Island beaches to the public. Shortly before the turn of the century, a part of the Oregon beach was declared to be a public highway in an effort to keep it open to the public. In 1913 that policy was extended to all of the Oregon wet-sand beaches by the Oregon legislature.

From 1913 until the early '60s, most Oregonians were secure in their belief that they owned the entirety of the

Oregon beach. Certainly they had been free to use the entire beach without interference until the owner of a motel erected a fence on the dry-sand portion of the beach and posted a sign that read: "Surfsand Guests Only Please." This led to the passage of the Oregon Beach Law in 1967 which was similar to the Texas Open Beaches Act. This Act codified into law already existing public rights to dry-sand beaches and gave the State Highway Commission the authority to police, protect, and maintain them.

The Act said that the legislature:

> . . . recognizes that over the years the public has made frequent and uninterrupted use of the ocean shore . . . sufficient to create easements in the public through dedication, prescription, grant or other use . . . the Legislative Assembly hereby declares that all public rights . . . are vested exclusively in the State of Oregon.

Both of these acts codified the common law of beach ownership and gave the Attorney General legislative authority to protect that ownership. Both acts have been challenged several times but have been consistently upheld by the courts.

Other states have dealt with access through park programs, but few acted with the force and direction of Oregon and Texas.

Coastal Zone Management Act

In 1976, in order to give added direction and focus to the coastal zone management program, Congress added Section 305(b)(7) the Shorefront Access Amendment to the Coastal Zone Management Act. The amendment requires that "the management program for each coastal

state include . . . a definition of the term 'beach' and a planning process for the protection of, and access to, public beaches . . . ." The Report of the House of Representatives Committee on Merchant Marine and Fisheries commented on Section 305(b)(7):

> The Committee wants, by this requirement, for state Coastal Zone Management Programs to identify their publicly held coastal areas and to devise policies which will either provide for their protection, where that is appropriate as with ecologically significant wildlife areas, and for their ready access as is appropriate with a public beach. Whereas the present management programs must include an inventory and designation of 'areas of particular concern,' this new requirement focuses particular attention on publicly held properties and directs that plans for their best management be included in the state program.
>
> Access to public beaches and other attractions in public ownership in the coasts has come to be identified as one of the critical problems facing local and state governments . . . . The Committee position is that action is needed now to help provide the needed access, especially, in urban areas, and that to wait will only mean additional expense to the taxpayers. The key gain is that the purchase of such access, as is provided in the addition to Section 315(2) . . . be tied to a comprehensive plan. That is the intent of this new requirement under 305 program development—that all such purchases fit into an overall program for each state.

Regulations implementing 305(b)(7) were hurriedly drawn, and the state managers were advised to "expedite" their shorefront plans. This was interpreted by them, apparently correctly, to mean "don't spend much time on this, it isn't very important."

The result of this less than enthusiastic performance of OCZM in implementing the shorefront access planning amendment resulted in a wide range of uneven responses from the states. Thus far twenty-one states have prepared shorefront access planning elements. Of these, seventeen have been approved by OCZM. They vary from being almost totally devoid of substantive content to being very imaginative and creative. Generally the states that have been concerned with beach access prior to passage of 305(b)(7) prepared the more significant programs, and the states that were uninterested before were still uninterested.

The substance of the programs fell into several areas:

Access to access

Several states concluded that the chief problem was not the lack of accessways but the inability of people to get to the accessways. From this observation a number of programs were developed which involved some sort of mass transit. New Jersey and North Carolina experimented with shuttle buses running from remote parking lots to accessways. Hawaii attached surfboard racks to some of the buses serving the coast of Oahu so that surfers could use mass transit to get to the beach. In the San Francisco metropolitan area, special buses go to the Golden Gate Recreation Area and Point Reyes National Seashore. Time sharing programs for industrial and commercial parking lots have been suggested whereby the public would lease private parking lots or spaces that are not used on weekends. On the negative side, the lack of parking and inability to provide it has been used as a rational for denying access and as a means of limiting it.

Management of existing access

Perhaps the most interesting access programs have been developed in this area. States have developed programs to systematically review their coastal areas to discover accessways that are already in the public ownership and areas of beach that the public has the right to use. Sometimes known as "protection of public property rights programs" public ownership and use rights are documented and programs to protect them in the future are developed. These range from the ancient trails of Hawaii and early rights of way contained in Rhode Island's King James Charter to deeds "lost" in an eastern North Carolina courthouse and "unowned" islands in Maine.

Acquisition

There are any number of variations on this theme that are used by various public bodies to obtain accessways.

Purchase: A number of states have active programs to purchase accessways. Oregon and California, for example, have been systematically buying relatively small accessways along the coast with the intent, in the case of Oregon, of providing an accessway every 1.5 to 3 miles. Up until now the U. S. Land and Water Conservation Program has been a reliable source of federal money for this sort of purchase program. Some states (Massachusetts, Michigan, Oregon and New Jersey) have or are studying the possibility of creating special state funding sources to acquire accessways. One of the interesting variations is the rights that are suggested for purchase. For example, an easement acquired by the public to use an accessway restricted to the use of lot owners in a subdivision or the acquisition of an access easement on top of a utility right of way, etc.

As a condition of a permit: Several states and many communities require that accessways be dedicated to the public as a condition of obtaining a permit to develop or subdivide a parcel of shorefront land. In some states, the developer is simply precluded from closing existing accessways, but in others they are required to provide new accessways, and in others they must provide and develop (pave and landscape) the accessway.

As a condition of public expenditure: Some programs such as the Corps of Engineers beach nourishment program and a number of state programs require that before public funds can be spent on a beach project some arrangement to ensure public access to that beach must be established.

Acquisition as a part of a coastal regulatory program to mitigate loss in market value: It has been suggested that oceanfront lots should be acquired for access in situations in which the regulations imposed by the coastal zone program come close to leaving the owner with no reasonable use of his land and thus tempting a taking challenge. A related suggestion is the acquisition of properties destroyed or seriously damaged by a natural hazard, thus providing access and preventing the re-development of a hazardous area. An obvious advantage to the latter program is that Federal Insurance Administration funds may pay a part of the purchase price.

Acquisition through usage: The acquisition of an easement by the public through continuous usage under some form of implied dedication or customary use doctrine has already been discussed and is often a part of management programs.

Federal land: The federal government and the Department of Defense in particular own a great deal of the

coast, and much of it is located close to urban centers. It has been suggested that at least a part of the coast owned by the military could be opened for civilian recreation without jeopardizing the national security. In some few cases military bases have been declared surplus and made available to state and local governments for public use.

Case Studies

The eight state beach access programs that are described in this section were prepared in response to the federal Coastal Zone Management Act although as will be seen several of the states were active in beach access long before Section 305(b)(7) was adopted. All of the programs have been approved by the Office of Coastal Zone Management except for Texas which, as of this writing, is not participating in the federal program. As will be seen, these are not presented as models but rather as examples of how states are dealing with beach access.

California

California public policy has long recognized the recreational value of its coastal resources but access to the beaches decreased as coastal development increased. The state constitution and federal Coastal Zone Management Act provided the incentive and authority for an aggressive state program which among other things requires new development to provide public access to the shore.

While the definition of the public portion of the California beach is the area from mean high tide seaward, the California Constitution guarantees access across private property to all coastal tidelands. Over the years this right has been defined by various statutes and court decisions. California courts have recognized an implied dedication if

the public has used a privately owned area for at least five years.

California's coastal management program addressed the access issue extensively prior to the adoption of the 1976 amendments to the federal Coastal Zone Management Act. The California basic access policy is to "maximize public acccss to and along the coast and maximize public recreation opportunities in the coastal zone consistent with sound resource conservation principles and the constitutionally protected rights of private property owners." The policies of the management program expand on this theme asserting that development shall not interfere with the public's right of access to the shorefront where it has been acquired through use or legislative authority, including use of the dry-sand portion of the beaches and rocky coastal beaches to the first line of vegetation. The policies also call for public access from the nearest public roadway to the shoreline and along the coast wherever possible and in addition for the provision of adequate public facilities (such as parking lots and bathrooms) in order to distribute use throughout the area and prevent overcrowding.

At the heart of the California coastal management plan's access element is the consistent exercise of development review and permit conditioning. All proposed coastal developments must be reviewed for their consistency with state policies among which is the provision of adequate access from the nearest public road. This access provision usually results in the dedication of an easement, but can also include a requirement that the developer provide a stairway or ramp to the beach, a public parking lot, or a bikeway. The dedication requirement has been unpopular with developers, but continues to be upheld in court. The

major problem with the dedicated rights-of-way is finding a public body willing to accept and maintain them. The California legislature requires that a public body must agree to maintain a right-of-way before it may be opened to the public. The financial cutbacks imposed by Proposition 13 have discouraged local governments from accepting the burden of maintenance, security and liability that accessways carry with them. The California Coastal Commission and California Coastal Conservancy are currently working together to find agencies and homeowner groups which are willing to accept these responsibilities.

The coastal management program also coordinates the efforts of many other agencies to acquire coastal land for public recreational purposes. The State Urban Coastal Bond Act which was passed by California voters in 1976 provided $145 million for the acquisition of coastal areas and $10 million for the California Conservancy to begin its acquisition program. Approximately $250 million of state and local bonds have been approved for acquisition purposes during the last six years.

The California Coastal Commission has recognized that the lack of public transportation prevents many citizens from getting to the coast. Thus, although coastal management program funds do not directly subsidize any transportation programs, local governments are being encouraged by the Coastal Commission to arrange for transportation to the beaches through their transit authorities. Transportation programs also work to reduce the demand for parking at the point of access.

Coastal management officials continue to seek solutions to four major shorefront access problems in California. In southern California there is inadequate transportation to

the coast and inadequate parking to serve coastal recreational demands. In many areas of northern California agricultural land must be crossed to get to the shorefront. In rocky coastal areas, topographic conditions such as steep bluffs pose hazards for those seeking to use the beach below. Finally, as is the case in most coastal areas, the delicate balance between the right of public access and the protection of natural resources must be struck.

Maine

Shorefront access is a delicate political issue in the state of Maine, which has a long tradition of private property rights along the coast. As a result, state coastal management officials have been cautious and conservative about developing new public access opportunities and/or attitudes.

Except in a very few cases, private ownership extends to mean low tide or 100 rods (503 meters) from mean high tide (whichever is less). The Colony Ordinance of 1641 authorized private land ownership in the intertidal zone, subject to public rights for fishing, fowling and navigation. Recreational rights are notably absent from this list. Since that time there has been no litigation or legislation redefining shoreline ownership and the attitude toward public access to the shoreline remains basically closed.

Only a small percentage of Maine's predominantly rocky coast is sandy beach. An inventory by the Maine State Planning Office found that only 75 miles or 27% of the state's coast was sandy. Of this, approximately .5% belong to the federal government, 8.5% belong to the state government, 12.5% belong to local governments and 78.5% are in private ownership. Thus, publicly owned sandy

beaches are extremely limited in Maine. Boating access is perhaps a more important issue in the state, not only for recreational boaters and fishermen, but also for commercial fishermen whose livelihood depends on their access to the water.

Traditionally, Maine's coastal communities have provided access to the shorefront for local residents only. Where a town beach or a town harbor has been established, its use is generally restricted to local residents. State coastal program officials had intended to work with the Attorney General to set forth a broader state position for public shorefront access and use rights, but the case upon which this process was to start was dismissed and the program has not been pursued.

There has been little or no change in Maine's policy toward shorefront access since the passage of the 1976 amendments to the federal Coastal Zone Management Act. State officials are wary of introducing shorefront access legislation for fear that it will be defeated and that a "legislative intent" argument could then be used against any future attempts to provide public access. They also assert that there is little demand for increased access. Thus, there has been little activity at the state level to develop new access policies or to create new access opportunities. Provision of shorefront access remains at the discretion of the property owners.

Given this political environment, the shorefront access policy statement of the Maine coastal management program is, not surprisingly, weak. It contains some definitions, ideas for planning and inventory and a description of existing Maine legislation which protects existing shorefront

access. The two major pieces of legislation cited are the Coastal Wetlands Alteration Act and the Mandatory Shoreland Zoning and Subdivision Control Act. The former requires permits for dredging, draining, filling, and the construction of permanent structures on or over any tidal or subtidal land and conditions these permits on the protection of existing navigational and recreational uses. The latter enables municipalities to plan, zone, and control the subdivision of land to "conserve shore cover, visual as well as actual points of access to inland and coastal waters, and natural beauty." Both of these existed prior to 1976 and neither takes an aggressive stance toward access (i.e. both protect "existing" access only). The policy statement does not propose any stronger methods for expanding access opportunities.

Some coastal management program projects have had an affect on shorefront access. Coastal Zone Management funds have been granted to approximately a dozen municipalities for feasibility and design studies for the development of urban waterfront parks and fish ports and have also sponsored a State Bureau of Parks and Recreation study to identify potential sites for acquisition as state shorefront parks. Approximately fifteen communities have taken advantage of the Title Search Assistance Fund for legal research to identify existing public access points. Finally, CZM funds were used for a study which identified potential sites for fish piers. The state is now using Economic Development Administration and bonds funds to construct six of these facilities.

The legal definition of shorefront ownership and the conservative political attitude toward public access are the major obstacles which state coastal program officials face.

Michigan

The rights of private owners of lakefront property are so extensive in Michigan that state officials have decided that providing access across private property to the shore is an inadequate solution to meet recreational needs. Instead, they have focused on acquisition and development of whole shorefront parcels to be managed as public recreation areas.

According to Michigan law, the high water mark is the legal boundary between public and private ownership. The state holds the "bottomlands" located on the lakeward side of the ordinary high water mark in public trust under the provisions of the Submerged Lands Act. Riparian private property owners hold the land above the ordinary high water mark and have exclusive use of the state-controlled bottomlands when they become exposed by declining water levels. Thus, the public has a right to use the water, but access to the shore is limited by the "one foot in the water at all times" rule.

Historically, the state of Michigan has sought to increase public access opportunities by actively encouraging state, county, township and municipal acquisition of shorefront property. Three major sources of funds have been used to finance and acquisition. The Michigan Waterways Funds, which has been administered by the Michigan Waterways Commission since 1945, matches a 90% federal contribution with a 10% state or local contribution to develop facilities for public access to Michigan waters. These funds have been used for the construction of boat launching ramps to docks. Nearly 1,000 public access sites have been built and equipped for boaters since this program began. Since 1965 the Michigan Department of Natural Resources

has allocated federal Land and Water Conservation Funds for recreation-related acquisition and development programs throughout the state. Shorefront properties have been a major priority of the Michigan LAWCON program. In 1976 the Michigan Recreational Land Trust Fund Program was established. The fund raises revenues from leases and royalities from oil, gas, and mineral extraction activities on state lands and uses this money to acquire property as public recreation sites.

Michigan's response to the 1976 access amendments to the Coastal Zone Management Act has not been particularly innovative. Basically, the coastal management program has been used to reinforce existing state access policies and programs. The Department of Natural Resources, which has the responsibility for the state's enviromental and recreational programs, is the lead agency for coastal management. Policy is set at the state level and technical assistance and grants are made available to the local level to implement access programs.

The Michigan shorefront access policy statement follows the OCZM guidelines and refers extensively to the policies defined in the 1974 Michigan Outdoor Recreation Plan (SCORP) and those expressed by various divisions of the Department of Natural Resources. The emphasis on public acquisition of land for recreational purposes is reinforced, but few other management techniques for increasing shorefront access are presented.

Coastal management officials have defined their responsibilities toward access in terms of providing technical assistance and "seed money" to local communities to help leverage additional funding for the acquisition and development of access sites. Approximately half of

the Michigan coastal management program access budget goes toward grants to local communities. The majority of these grants fund projects which create, improve, or preserve shorefront access. At the time of application for state coastal management funds for project feasibility review and design, local communities are asked to identify potential funding sources for land acquisitions and/or project development. After the design phase is complete, state coastal management officials provide technical assistance to help procure this outside funding.

Urban waterfront parks have been popular local projects which increase shorefront access opportunities. In Detroit three small, existing parks will be tied together by a riverfront walkway, part of which extends through an industrial section of the city. Similarly, several small public parcels in Mackinaw have been tied together with a walkway which necessitated the granting of easements across private property. In St. Ignace, a ¾ mile long promenade will provide visual access to the shore, but no physical access. Bike path designs have been funded in Detroit, Marquette, Grand Haven and Sault Ste. Marie.

Michigan coastal management funds have also been granted to seven state parks for the construction of boardwalks which provide access across dunes and wetlands while preserving these environmentally fragile areas.

The major access problems which Michigan coastal management officials cite as needing ongoing attention are a lack of shorefront access in urban areas (especially Detroit) and protection of sensitive environmental areas from the pressures exerted by those seeking access to the shore.

New Jersey

Although the legal definition of the "public" portion of the beach allows for liberal use of New Jersey beaches, a history of shorefront development and exclusionary local regulations has made access to the beach itself difficult. The New Jersey Department of Environmental Protection is currently implementing regulatory, financial incentive and transportation programs designed to open up more shorefront access opportunities for the public.

The public portion of the New Jersey beach is from the vegetation line seaward. Thus, the public has the right to use both the wet-sand and dry-sand portions of the beach. However, most shorefront developments have blocked visual and/or physical access to the shore. Some municipalities which own land adjacent to the vegetation line have enacted laws or regulations which make shorefront access inconvenient, expensive or impossible for non-residents. Inland residents have been deprived of adequate access to shorefront recreation areas.

The state of New Jersey placed the responsibility for administering its coastal management program within the Department of Environmental Protection. The Department has begun to take a more aggressive stance on providing public shorefront access. Actions of the Department are based on New Jersey's simply stated shorefront access policy:

> "Coastal development adjacent to coastal waters shall provide maximum practicable public access to the shorefront, including both beach and built-up waterfront areas and both visual and physical access. Shorefront development that limits public access and the diversity of shorefront experiences is discouraged."

The Department of Environmental Protection is currently using four methods to implement its shorefront access program. First access regulations are imposed on new shorefront developments. The Department of Regulation requires that each project provide "maximum practicable access" to the shorefront as a condition for the issuance of a development permit. Projects can provide access through such means as public walkways, boat launch ramps, or public parking lots. Second, shorefront access conditions are also placed on Shorefront Protection Funds, which finance dune restoration, erosion control and beach nourishment projects. Municipalities which accept these funds must pledge to establish and maintain public access to the area being funded. Third, provision of waterfront access is an eligible activity encouraged by CZM grants to local communities. Grants of this type are being used for such projects as developing urban waterfront parks. Fourth, the Department of Protection sponsors shuttle bus transportation each summer weekend from a parking lot near the Garden State Parkway to a state beach 12 miles away. Approximately 8,000 people each summer take advantage of this service which provides shorefront access to inland residents of New Jersey.

New Jersey coastal management officials continue to search for solutions to the state's four major shorefront access problems: (1) the best beaches are difficult to get to without a private auto; (2) almost none of the beaches are free any more (most charge an admission price); (3) the supply of bath-houses and parking lots

is inadequate to meet demands; (4) the large amount of development on the shorefront is causing major erosion problems which could necessitate the closing of beaches to use by the public.

North Carolina

Unlike most coastal management programs, the North Carolina Coastal Area Management Act places major responsibility at the local level. As a recent addition to the coastal management mandate, the issue of shorefront access is being treated in a similar manner.

Lack of adequate public access to beaches had been a concern in North Carolina prior to the passage of the 1976 amendments to the federal Coastal Zone Management Act. Each year coastal communities were experiencing an increase in the volume of day visitors to their beaches, yet few of these municipalities had the incentive or tools to meet demands for access. According to North Carolina law, the public has a right to use the wet-sand portions of the beach, but in order to get to these areas, privately owned upland areas must be crossed. Coastal communities perceived their financial resources to be inadequate to acquire, police, maintain and service accessways to the public portion of the beach on a large scale. Private property owners were generally unwilling to allow public access across their land. Some communities had passed ordinances which required subdivision developers to dedicate the ends of streets running perpendicular to the beach and other accessways to the public. However, these accessways have traditionally been unmarked and tend to have little or no parking capacity.

In keeping with the coastal management framework which had already been established, general shorefront

access policies were established in 1978 at the state level, but the primary responsibility of insuring adequate public access to the public portions of the beach was delegated to the local level. The shorefront access policy statement in the North Carolina Coastal Management Program declares that state policies are designed to "supplement and strengthen any local efforts."

The state's shorefront access policies assert that:

—development shall not interfere with the public's existing rights of shorefront access (i.e., those acquired through public acquisition, dedication, or customary use established through the courts);

—public beach area projects will not receive state or federal funding unless provisions are made for adequate public access (including rights, identification and parking);

—coastal dunes shall be protected;

—the state shall continue to support and improve highway, bridges and ferry access to coastal areas;

—the state shall continue to support the development of fishing pier facilities;

—access shall be made available to people of all socio-economic groups.

The North Carolina Coastal Resources Commission (CRC) had mandated coastal communities to include a shorefront access element in their up-dated land-use plans, which are due to be submitted to the CRC for review and approval during the fall of 1980 and 1981. Specific issues to be addressed in these plans include the definition of "access," identification of existing and potential access points within the jurisdiction, identification of methods

for improving access and provision of adequate parking to meet access needs. The CRC hopes that the state's shorefront access program will be adequately defined by these local plans; the Commission does not anticipate designing a program at the state level unless the local plans prove inadequate.

Approximately $100,000 of 306 funds have been granted to local communities to assist in shorefront access planning. Twelve municipalities have been granted funds to either develop beach access plans or design waterfront parks which will increase public access opportunities. Edenton a peninsula which juts into Queene Anne Bay will be developed as a park, a bulkhead will be installed to stem erosion, an icebouse will be restored for use by the public, and a parking lot will be developed. Wilmington is planning a six block long riverfront park. Cape Carteret, a non-beach community, is studying the feasibility of acquiring land for a parking lot at Emerald Isle to allow Cape Carteret residents access to beach areas. Holden Beach, Washington Park, Kill Devil Hills. Nags Head, Surf City and Carteret County are among the localities which have conducted studies to identify potential and existing access points and tools for developing more.

The North Carolina Office of Coastal Management has imposed provision of shorefront access as a condition on some major Coastal Area Management Act (CAMA) permits. Large oceanfront projects such as hotels and condominiums have been encouraged to provide public walkways and parking lots, but the permit review officials are unsure of their legal authority and have therefore been somewhat inconsistent in exercising this option.

During the summer of 1979 the North Carolina Department of Natural Resources and Community Development's Office of Coastal Management and Wrightsville Beach jointly funded a shuttle bus to bring people from a feeder parking lot in Wilmington to Wrightsville Beach. By all accounts, the experiment was a failure; ridership was extremely low and the project lost money. Some reasons cited for the failure include inadequate advertising and locating the feeder lot too near the beach (i.e. people who had driven as far as the feeder lot decided that they might as well drive the remaining distance to the beach). There are no plans to fund a revised attempt at providing mass transportation for beach access in North Carolina.

Oregon

The state of Oregon has been a forerunner in guaranteeing public access to the shore. Sanctions for public use of the beach date back to the nineteenth century. Oregon had passed a Beach Law which opened all beaches to public use long before the federal Coastal Zone Management Act was passed and thus had no problem complying with the 1976 amendments. State and local officials are now using the coastal management program to extend access rights into estuarine areas.

In 1893 the beaches of Clatsop County, Oregon were declared to be a public highway. In 1913 the Oswald West Act extended this policy by declaring that all wet-sand beaches were public highways. The "public" portion of Oregon beaches had been generously defined as the area from the non-aquatic vegetation line seaward. Thus Oregon residents have historically had good use of the shorefront.

By the mid-'60s the state legislature was becoming increasingly concerned about the potential loss of public use of and access to Oregon's beaches as development pressures increased. In 1967 the Oregon Beach Bill was passed; it declared all beaches to be open to public use. A concerted effort has also been made to keep as much of Oregon's coastal land as possible in public ownership. Thirty state parks are located in coastal areas. The goal of providing public accessways every 1.5 to 3 miles along the coast has nearly been met.

The Oregon Department of Land Conservation and Development (DLCD) has been designated the lead agency for coastal management. Prior to the adoption of the 1976 amendments to the federal Coastal Zone Management Act the DLCD had defined the state's policies for shorefront access in the Statewide Planning Goals. Oregon DLCD officials consider shorefront access provision an important element in the state coordinated land-use planning process. The DLCD also coordinates the many access-related programs which various state agencies administer. Among these are the Oregon Beach Access and Parks Acquisition Program, the Department of Fish and Wildlife Angler Access Program. Each update of Oregon's Statewide Comprehensive Outdoor Recreation Plan (SCORP) provides supply and demand information and policies on shorefront access which are consistent with Statewide Planning Goals.

The Department of Land Conservation and Development is in the process of extending access program development and enforcement to the local level. Cities and counties are presently preparing comprehensive land use plans which are to comply with the Statewide Planning Goals.

Among the shorefront access issues to be addressed in these plans are the identification of further public access needs and the development and adoption of tools and controls to meet them. The local land use plans are due for LDCD review in July 1980. Based on the information gathered from these plans, state level coastal management officials will design a program of technical assistance to help strengthen and/or supplement the local plans and programs.

Oregon coastal management officials are presently working on the next step toward increasing public access to the shore. The issue of balancing access to estuarine areas with the protection of their fragile ecosystems is currently being studied for future policy and program development.

Rhode Island

The state of Rhode Island has a plentiful supply of shorefront access opportunities via public parks and beaches, conservation areas, scenic view points, and rights-of-ways. The physical configuration of the state and its shoreline allow many people to live within walking and biking distance of the coast. Coastal management program officials have given public recreational use and enjoyment of the coastal region a high priority. Thus, the shorefront access element of the Rhode Island coastal management program stresses the ongoing verification of public rights-of-way, publication of their location, and continued evaluation of development proposals to insure that they do not jeopardize the public's right to use and enjoy the shore.

Legal rights to shorefront access have a long history in Rhode Island. During the seventeenth century the King

James Charter designated rights-of-way to the shoreline for fishermen and seaweed collectors. Since that time, some of these rights-of-way have been built upon, some forgotten, and others kept in continuous use as accessways. In more recent times, the state and many municipalities have been active in setting aside coastal land for development as public recreational areas. Eighty-five parks of various sizes currently provide public access to the shoreline; 66 of these are locally managed, 18 are state parks, and 1 is managed by the federal government.

Thus, even before the Coastal Zone Management Act was passed and a state CZM program was set up in Rhode Island, state and local officials had developed management capacities for providing public access to the shore. The Rhode Island Department of Environmental Management is the lead agency for most forms of recreational access; it implements various recreational programs and policies and has the authority to acquire and manage parks, beaches, launch ramps and conservation or management areas as set forth under Title 42, Chapter 17 of the Rhode Island General Laws. The amendment to the Coastal Resources Management Council's enabling legislation has assigned the Council the responsibility for identifying and opening public rights-of-way to the shore. Local municipal recreation authorities also establish and maintain recreation areas which provide shorefront access.

The shorefront access policy statement in Rhode Island's coastal management program is one of the best written to date. It recognizes that the state is already richly endowed with public shorefront access opportunities, but also points out that the distribution of coastal rights-of-way is geographically uneven, that public rights-of-way

along substantial lengths of shoreline remain unverified, that public rights in many presumed rights-of-way are contested, that parking at popular rights-of-way is frequently inadequate, and that vandalism, littering and trespassing on neighboring private areas are issues of growing concern. Four access policies are set forth:

(1) Public recreational use and enjoyment of parks and beaches is a high priority use of the coastal region.

(2) No permit shall be issued for development if it interferes with public use or enjoyment of the shore.

(3) Legally protected rights-of-way are to be verified and their existence publicized.

(4) The Coastal Resources Management Council recognizes the management responsibility of the Department of Environmental Protection and municipal recreation authorities as they relate to public beaches and parks, and shall endeavor to support these responsibilities to the maximum extent, consistent with other Council policies and requirements.

The coastal management program in Rhode Island is funding efforts to solve two of the major shorefront access problems in the state: lack of lateral access at beaches (i.e. access to both the "wet-sand" and "dry-sand" portions of the beach) and ill-defined rights-of-way to the beaches. Coastal management officials are also exercising the permit review power to place conditions on new coastal development in order to protect shorefront access opportunities for the public.

The "public" area of Rhode Island beaches is generally defined as the area from the mean high water mark

seaward. 306 funds are currently underwriting a study to investigate the potential of broadening this definition of public beach. The constitutional, legislative, and judicial principles of shorefront access are being examined in anticipation of the drafting of future legislation to open up more of the beach to the public.

306 funds are also being used to complete the process of verifying the King James Charter rights-of-ways. This effort was begun with mostly volunteer assistance in the mid-1960's. The earlier study identified as many rights-of-way as possible without doing a full scale search of legal documents. The rights-of-way which were identified by that study are presently being maintained through a partnership between the Coastal Resources Management Council (which uses CZM money to fund two maintenance workers) and the Rhode Island Marine and Fisheries Division (which uses state funds for four to six maintenance workers). Maintenance includes grass cutting, trash collection, rock clearing and stairway construction and maintenance.

Using CZM funding, the state has hired twelve attorneys to document every possible right-of-way. Public meetings are being held on a town-by-town basis to identify public perceptions of rights-of-way, land is surveyed, and title searches are conducted. Program administrators intend to file new deeds which will document existing public accessways. All practical rights-of-way will be opened; those in environmentally sensitive areas and those located very close together will not necessarily be kept open and maintained.

The third major element of Rhode Island's shorefront access program is the stringent use of the development

permit review power. Permits for development within the coastal zone are always conditioned on protecting the existing public access to the shorefront.

Thus, the Rhode Island coastal management program is currently working to solve two of the major shorefront access problems (beach use, ownership and identification of access), but other access issues remain to be dealt with. Among concerns voiced by coastal management officials are the lack of parking near access and the disappearance of natural coastal areas development as pressures grow.

Texas

The state of Texas does not yet have a coastal management program approved by the federal Office of Coastal Zone Management, but public access to the shorefront is protected under the provisions of the Texas Open Beaches Act of 1959. Access planning and program management falls under the jurisdiction of the Texas Parks and Wildlife Department.

The Texas Open Beaches Act was passed in reaction to attempts by private landowners to close some Galveston Island beaches to the public, thereby challenging a right which the public had acquired through the continuous use of the beaches, bays and gulf waters of Texas since the time of Spanish ownership. The Texas Open Beaches Act guarantees the public unrestricted access to and the use of (1) the state owned portion of beaches below the mean high tide line (wet-sand), and (2) the larger area extending from the mean high tide line to the first line of vegetation (dry-sand) in all areas where the public has acquired a right of use of easement by presecription, dedication, or

continuous use. The provisions of the Act do not apply to any beaches on barrier islands or peninsulas that are not accessible by public roads or common carrier ferry. This includes San Tose Island, Matagorda Island, and the Matagorda Peninsula west of the Colorado River channel. A coastal area is considered accessible if it meets any of the following three criteria:

(1) if it is presumptively legally open

(2) if it is in public ownership

(3) if for any reason the public has a legally protected right of access to and use of the area.

The Texas Open Beaches Act is enforced by the Texas Attorney General, county attorneys, and criminal district attorneys. Early judicial tests of the Open Beach Act by littoral landowners failed to either invalidate the Act or find any beach covered by the Act to be closed to the public. These early failures, combined with a policy of rigorous enforcement by the State Attorney General and local legal officers, have discouraged any subsequent attempts to close a beach which is covered by the Act.

The Texas Parks and Wildlife Department (TPWD) has employed two methods to obtain public access to the shorefront. First, a program has been established to provide boat ramps in coastal areas. Second, a land acquisition program has been instituted to provide public recreation areas along the coast.

The TPWD Special Boat Fund is supported by revenues collected from boat registration fees and a portion of the unclaimed water boat fuel taxes. The state provides 70% of a boat ramp project's cost if the locality where the

access facility is to be located provides the remaining 30%. A completed project includes a boat ramp, parking area and access road. Once the facility is constructed, it is maintained by the TPWD. Recently, approximately three boat ramp projects have been constructed in coastal areas each year.

The TPWD has the authority to acquire new public shorefront recreation areas as the public need arises. Determination of this need is based on the Texas Outdoor Recreation Plan (TORP). Acquisition is funded by the TPWD's Fund 31, which is supported by a portion of the state cigarette tax revenues. Approximately $11 million are available each year for acquisition and development. Local acquisition projects are assisted by federal Land and Water Conservation Funds which are administered by TPWD.

The provision of increased public access to Texas beaches has caused some management problems. Among the major problems which must be addressed are congestion (even though other accessible beaches are not crowded. Galveston and Mustang Beaches and the North Padre Islands sustain heavy use), vehicular traffic on the beaches (which can endanger non-vehicular beach users), and litter.

The Draft Santa Monica Land Use Plan appears at pages 000328 to 000335 in the second administrative record.

COASTAL RECREATION:

A HANDBOOK FOR PLANNERS AND MANAGERS

Robert B. Ditton and Mark Stephens

January 1976
Washington, D.C.

U.S. DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration
Office of Coastal Zone Management

3. MALDISTRIBUTION AND MISALLOCATION OF RECREATIONAL RESOURCES:

A STATEMENT OF THE PROBLEM

3.1 *Public Access: A Focus for Coastal Recreation Planning and Management*

"The fight for a foothold on Iwo Jima may have been the bloodiest of all, but Martha's Vineyard is no picnic either. . . . In a soft economy the only safe investment is in a company manufacturing 'No Trespassing' signs . . . and any citizen can use the beach at East Hampton (Long Island) as long as he is willing to leave his car near Times Square and walk the rest of the way[1]."

With these three quotes, Calvin Trillin reflects on sand as real estate and identifies *three of the major problems facing recreation resource planners and managers today: 1) peak recreational use periods; 2) the shoreline of most of the United States is in private ownership; and 3) the short supply of existing public shoreland and access areas is near saturation.*

---

1 Calvin Trillin, "U.S. Journal: The Coastline — Some Reflections on Sand as Real Estate." *New Yorker Magazine*, November 18, 1972, pp. 215-224.

From any map, it appears that the mileage of U.S. coastal shoreline should be abundant. A closer look reveals that in terms of effective shoreline and shoreline with public access, this is far from the case. In fact, effective shoreline is a scarce commodity and is being further reduced almost daily by numerous factors.

Of the 60,000 miles of shoreline of the 48 contiguous states, only about one-third is considered suitable for recreation activities. Only 5.5 percent of this recreational shoreline is in public ownership, with 3 percent restricted for military purposes and 91 percent in private ownership. Trillin's reflections on sand as real estate should be more meaningful now. When the *total coastal shoreline* (not recreational or effective shoreline) of the 48 contiguous states is considered, less than 2 percent is in public ownership[2].

There are regional differences in this national coastline trend. Public ownership of shorelands in the Northest United States is in very short supply. On the entire Atlantic coast, for that matter, there are only 336 miles of shoreline that are publicly owned for recreation. This is only 3 percent of the recreational shoreline. The shortfall in public shorelands or access is particularly critical within a half day's drive of population centers where, as can be expected, recreation demand is most intense. This shortage of public shorelands and access is further magnified when we realize that 54 percent of the nation's population (excluding Alaska and Hawaii) lives within the 50-mile coastal strip that comprises but 8 percent of the total

2 Dennis W. Ducsik. *Shoreline for the Public.* The MIT Press, Cambridge, Massachusetts, 1974, pp. 42-43.

U.S. land area[3]. It can be expected that this population trend will continue as economic development of the coastal zone continues. The estuarine zone then is nearly twice as densely populated as the rest of the country[4]." In summary, migration to the cities has paralleled the move toward increased private ownership of coastlands. Today, the supply of public shorelands and access is unable to meet public recreation needs. It's unlikely that public resources will shrink further but, more importantly, *further efforts need to be made to 1)* recognize *the public rights to use beach, and 2) further acquire coastal shorelands and access.*

There is evidence, according to Dennis Ducsik in his recent book *Shoreline for the Public* that "the tide is beginning to turn in favor of reclaiming the public interest in the shoreline." Methods and strategies to these ends are presented in Section 5.

3.2 *Barriers to Recreational Use of the Coastal Zone*

Put negatively this section reviews barriers to coastal recreation areas; put positively, the following can be regarded as suitability factors or areas that planning must confront.

3.2A Natural Barriers

Bluff and marsh areas, while still having recreational potential, rule out many of the most popular water based activities.

3 U.S. Department of Commerce, Bureau of Census, *Statistical Abstract of the United States* — 1972, Table 4, 1972, p. 6.

4 U.S. Department of the Interior, Federal Water Pollution Control Administration, *The National Estuarine Pollution Study*, Vol. 1, Part II, November 1969, p. 11.

The recreational use of many islands is most difficult with finanical access being the predominant requisite for use.

The impact of littoral drift, particularly when working in concert with man's use of protective structures, has kept beaches in perpetual and unpredictable lateral movement. It's possible for beaches to move to locations where perpendicular public access is not possible.

Soil erosion caused by adjacent land use practices has led to the filling-in of bays, often making them inaccessible for boating and swimming, and reducing wetland areas as well.

The extent of tidal fluctuation can tax existing recreation facility development technology and budgets with the result that facility development may not be extensive.

3.2B Multiple Use Barriers

It is often difficult to mix coastal uses within a multiple use framework. Impacts of other coastal uses are of two types: 1) direct, and 2) indirect. A direct impact would include the fact that cargo handling and wharf areas traditionally block access to large areas of shoreland; (these areas are usually fenced for security reasons). Additionally, port directors are not keen on having recreational craft and the necessary support facilities mixed in with commercial operations for obvious safety reasons. Indirect impacts would include a plant's impact on water quality (rendering it unfit for many recreation activities) and the impacts of dredging and spoil disposal for navigation and housing construction purposes (further filling bays and reducing fish and wildlife habitat).

Impairment of recreational use may be difficult to assess until reduced local spending associated with recreation is noticed. It is not enough to deal solely with bacterial contamination since the public's recreational use can be shifted by its perception and identification of unacceptable water conditions. Recreation is considerably more vulnerable here than most other coastal uses, as few substantive water quality requirements have been established.

3.2C Private Ownership Barriers

As has already been pointed out, most U.S. shoreland is privately owned. Legal access to the coast is therefore impossible in many areas. Even where the public's right to lateral use of beach and shorelands has been recognized, perpendicular access is difficult and expensive to develop.

The recent practice of private land syndication or land banking in which land is held back until artificial land values are induced may have a profound impact on the future of coastal lands. As land is held and sold by one land syndicate to another, the artificial value of the land more than precludes the "highest and best use" from being public park land. As syndication receives wider usage in coastal areas, it will be difficult not to site a plant, industry or resort on coastal parcels because of the high land costs involved. The broad implications of this practice for resource planning and management are as yet undocumented.

3.2D Transportation Barriers

There are some public areas that because of highway and other transportation linkages are virtually inaccessible. Sometimes this is by design, and necessary to protect areas from potential overuse.

Transportation problems associated with recreation are multi-faceted, and at times conflicting, reflecting the diverse objectives sought in leisure pursuits. Among these problems are:

- Deficient transportation access — by virtue of a total lack of facilities, or merely too low a capacity — to shoreline sites suitable for supporting recreational activities which could, theoretically, expand coastal recreational opportunities, and relieve use pressures and conflicts at existing sites;
- Highways, railroads and other transportation corridors have, at times, blocked usage of extensive shoreland areas;
- Inadequate or inefficiently located vehicular storage facilities — parking space limitations, for instance, may constrain the use of some sites, while other areas may have potentially valuable resource lands and waters preempted by such facilities;
- A lack of suitable transportation alternatives to private automobile use, including public transit (bus or other means), aquatic access (ferry or private boat), bicycle and pedestrian travel, and multi-modal combinations (e.g. "park-n-ride" shuttle service); and
- Insufficient consideration of recreation and open space values in traditional transportation models, especially with respect to secondary impacts of highway improvements (e.g. enhancement of shoreline land values, stimulation of private development and

indirect environmental effects of expanded road access).

Transportation barriers have been the result of over dependence on the auto. The mix of variously-priced means of transportation has been reduced if not eliminated over the years. Gone are excursion boat train and bus services. The result is that those who can afford to come travel largely by auto and require parking facilities in the coastal area.

With the increasing cost of gasoline, areas that have been traditionally close-by are now considerably more expensive for many to reach in terms of travel-distance costs. As gasoline and car prices continue to rise these costs will impose a growing constraint upon recreational travel.

3.2E Socio-Economic Barriers

Generally, the low income, less mobile segments of urban society must restrict their recreation activity (due to the alternatively higher travel costs involved) to those areas within or immediately adjacent to urban centers . . . areas where pollution and multiple use impacts are most severe, where areas are fewer in number and of poor quality, and where they are often inaccessible due to overcrowding.

The relative costs of participating in coastal recreation activities may be a barrier to some individuals and groups. While most will be able to afford a swimming or shore fishing experience, many will be unable to purchase experiences which require greater investment, e.g., deep sea or bay fishing, boating, scuba diving, and water skiing. The commercial sector has the capability of reducing some of these barriers and strategies for certain of these are discussed in Section 5.

Age, health and physical ability may also be barriers to participation and use. Facility and site planners are affording these factors greater consideration today through modifications in facility design and construction.

3.2F Visual Access Barriers

Not only is most coastal land in private ownership, but this land is being developed. For example, in the Recreation Element recently prepared by the South Coast Regional Commission (California) it was noted that "roughly 20 miles of the 110 mile coast of mainland Orange and Los Angeles Counties have views blocked totally by structures[5]." Traditionally, land values decrease the farther one moves inland with one exception — namely, those parcels of land with a view of the coast or shore. These private values, as well as the more compelling public values, are lost when visual access is blocked. The lack of visual access is particularly critical for the coastal recreation activities . . . their view is their sole tie to the shore and sea.

3.3 *Use Conflicts*

An increasing number of recreation participants and activities are competing for a relatively fixed amount of shore areas. With public shoreline access limited, coastal use tends to be concentrated around these access points. Without a comprehensive access system, it is difficult to disperse uses, and hence avoid many conflicts.

---

5 California State Commission and South Coast Regional Commission. *The Recreation Element for the South Coast Region: Draft Regional Element V of the California Coastal Zone Conservation Plan.* Preliminary Draft for Discussion. Long Beach: South Coast Regional Commission, 1974, pp. 11-13.

Many coastal bays and areas are simply too small to support intensive use; many areas like marshlands are unsuited to a wide variety of uses. Length of available shoreline, type of access, and density of development are all involved with use conflicts. Figure 1, drawn from a study of lake development, is illustrative of some of these relationships.

Multiple use conflicts in coastal areas are due to intensity, mixing and incompatibility of uses. Shoreland uses are directly related to the presence and extent of multiple use surface water conflicts. Conflicts involve physical competition for space, psychological incompatibility and destruction of resource-related values. Conflicts, if allowed to continue unmanaged, may result in reduced health and safety, deterioration of environmental and recreation experience qualities and inefficient use of coastal waters.

Examples of conflicting uses are arranged under these problem areas:

A. Health and Safety

Boating (bacterial waste) impact on swimming

Boating, Fishing, Waterskiing (potential hazards involving high speed craft) impact on swimming

B. Environmental and Recreation Experience Qualities

Boating (speed, wake and noise) impact on fishing

Surfing (interference with lines) impact on fishing

Boating (noise, litter, etc.) impact on shoreland residents and public users

Beach use with car (noise, visual) impact on pedestrian beach use

Public shoreland area use (noise, litter, disruption) impact on adjacent private residents

C. Inefficient Use of Coastal Waters

Waterskiing (large area needed) impact on all other uses

Boating (wake and result shoreline) impact on shoreland properties, erosion damage

Shoreland recreational uses may have direct consequences for water uses. For example, density of shoreline development (second homes and condominiums) is a critical determinant of water use density. Lack of boat launching access may lead to a reduced density and smaller, quiet craft. Beyond density concerns, development of shoreland housing may reduce water quality through erosion, dredging, filling, spoil disposal, and discharge of pollution contaminants, all of which impact on water recreation uses. Docks and fill reduce usable bay surface acreage available. Filling of wetlands and its impact on fish and wildlife impact is widely documented.[6] It is also important to recognize that many water recreation uses have the potential for impacting on shoreland uses. (See Figure 2 for a review of interrelated impacts.)

In addition to the interrelated problems posed by water surface and shoreland recreation activities, there are difficulties in problem identification. Impacts on health and safety can be determined by observation, monitoring water

[6]U.S. Bureau of Commercial Fisheries. *National Estuary Study*. Volume 2. U.S. Government Printing Office, Washington, D.C., 1970.

quality, accident trends, etc. Impacts on environmental and recreation experience quality occur according to user preferences. Since there is often little similarity among users, there is little reason to expect preferences or ideas of experience quality to coincide. To identify problems in this area, managers must supplement good common sense and ocular analysis ("eyeballin' it"), with interviews and use of validated questionnaires with participants.

3.4 *Peak Use Phenomenon*

Most coastal recreation, like other recreation activities, takes place very irregularly in peak use periods because of temperature and climate concerns, and timing of vacation periods. The effective recreation season is made up of mostly weekends and the vacation season (winter or summer depending on U.S. location). Areas that are used to capacity (or beyond) on the weekend may be vacant during the week.

Because use pressures are greatest at areas within 125 miles of metropolitan centers (with maximum demands directly adjacent to these cities) and because of the effective recreation season (due to work constraints and other commitments), the peak use phenomenon may be a inescapable aspect of providing parks and areas that are highly accessible. Just as in highway and other transportation planning, recreation development efforts cannot be geared entirely to peak use. Development needs to be tied to something less than peak use for public and private investment to be economically feasible and socially responsible. Alternately, efforts need to be made to mitigate the human and resource impacts of these peak use periods. Strategies and methods to accomplish this end are discussed in Section 5.

3.5 *Resource Degradation Caused by Excessive or Inappropriate Use*

Recreational use is rarely considered a problem. Yet the impact of providing for people's recreation activities has left and continues to leave its mark on natural resources. First, many recreation areas have been acquired by public agencies with little forethought given to how they will be managed to sustain the massive human impacts to which many will be subjected. Similarly, we find that many areas are planned and managed with economic impact concerns having distinct priority over environmental impacts. *Federal grant programs for recreation, as for many other areas, emphasize initial capital costs for acquisition and development. Little assistance is provided for continuing maintenance and operation expenses.*

It's difficult to consider recreation as a cause of pollution because recreation is traditionally the first use to suffer from water pollution and other degradation. But the pollution potential is there! The increasing number of recreationists engaged in diversified recreation pursuits (many with potential for heavy environmental impact like camping, all-terrain vehicle use, power boating and trail bike use), together with many of the developments specifically planned for their use, are further impacting on coastal resources. Examples of impact include extensive use of concrete for parking areas and facilities, destruction of dunes and coastal vegetation, interruption of ecological succession, noise impacts, increased forest fire hazard, oil in water, soil impact on tree cutting, disturbance of wildlife, etc.

If we are to sustain our present public shorelands, efforts need to be made to insure

they survive the onslaught of being too accessible for human use . . . this is where the peak use phenomenon interacts with resource protection strategy and methods. This interaction is one of the greatest management challenges facing shoreland managers today.

Some, like the American Waterworks Association, a group of water supply administrators, recognize the potential recreation impact on water quality and restrict the recreational use of their reservoirs because they do not have the means to mitigate the impacts.[7]

When coastal and shoreland resources are already in limited supply, such solutions are unacceptable. The essential task, however, is one of resource management where the human carrying capacity of each area is identified and maintained.

THE CUMULATIVE IMPACTS OF SHOREZONE DEVELOPMENT AT LAKE TAHOE

Phillips Brandt Reddick
McDonald and Grefe

February 1978

Recreation

The increasing structure density that will characterize maximum buildout will significantly reduce user enjoyment in some areas of the shorezone, due largely to aesthetic impacts.

Surveys of shorezone users indicated that pier densities of approximately seven piers per thousand feet of shoreline arouse dislike in nearly a quarter of those surveyed. Fourteen piers per thousand feet of shoreline increased the disapproval rate to over 40 percent.

Densities exceeding seven piers per thousand feet could occur along about 15 percent of the shoreline under maximum buildout. Densities of 14 piers or more would be limited to less than two percent of the Tahoe shore.

The pattern of reactions to moored boats parallels that to piers, according to the shorezone surveys. Densities of 20 moored boats per 1,000 feet aroused dislike in nearly a third of those surveyed; 33 moored boats aroused dislike in 45 percent of those surveyed.

Densities of moored boats are not specified in the maximum buildout scenario. Because mooring buoys may be substituted for piers under realistic conditions, a "maximum buoy buildout" scenario was specified. The extent of significant adverse reactions to structure density under

this scenario proved to be largely a function of the number of moored boats assumed to exist at multiple-unit parcels. As the latter could not be determined with any accuracy, no firm conclusions concerning structure impacts under a maximum buoy buildout could be reached. Illustrative assumptions of 30 and 50 moored boats per multiple-unit parcel suggested, however, that structures would have less impact under this scenario than under the maximum buildout scenario proper.

• • •

CHAPTER III

THE IMPACT ASSESSMENT MODEL

3.1 *INTRODUCTION*

3.1.1 PURPOSE

This chapter presents the iconic model of physical, biological, and socioeconomic impacts developed by the consultants for use in the assessment of the cumulative effects of development in the shorezone. The model presented herein has been developed for several specific purposes:

- To describe the patterns of physical, biological, and socioeconomic impacts associated with the construction, use, and alteration of structures in the foreshore and nearshore zones of Lake Tahoe.
- To assess the effects of the environmental and socioeconomic context of shorezone development on the nature and magnitude of the subsequent impacts produced by development.
- To assess the nature and magnitude of impacts likely to occur should shorezone development be permitted to proceed to the maximum densities allowed under the Shorezone Ordinance.

— To assess the changes in the physical, biological, and socioeconomic environment likely to follow partial development of the shorezone, focusing on the effects of increasing densities of shorezone structures.

— To compare the impacts of different types of shorezone structures, focusing on the tradeoffs among impacts between different structural configurations with the same functional purpose and capacity for use.

The design of the impact model, its structure and emphasis, reflects a particular conceptual framework for explaining the relationship between man's activities in the shorezone and subsequent environmental changes.

3.1.2 CONCEPTUAL FRAMEWORK

The model assumes that the different types of structures regulated by the Shorezone Ordinance may be classified according to (a) the activities involved in their construction, and (b) the changes in the physical configuration and use of the shorezone caused by their addition to the local environment.

• • •

3.4.3 POTENTIAL IMPACTS ON RECREATION USE AND THE REGIONAL ECONOMY

Our knowledge of the impacts of shorezone structures on recreation and the regional economy is based largely on original survey research. Surveys of shorezone users and interviews with key informants provide a useful indication of user reactions to structures and of their ultimate economic repercussions. Necessarily, our ability to hypothesize casual chains between structures and ultimate recreational and economic impacts exceeds our capacity to confirm these links with hard survey findings.

Both the recreational and the economic parts of this section consist of two elements. The first describes, in general terms, an approach to the analysis of impacts. The second describes the limitations imposed by the existing level of knowledge and the assumptions or added information necessary to apply the impact model to an assessment of a maximum or partial buildout scenario.

3.4.3.1 *Impacts on Recreation Use*

Causal Factors

Given the existing level and pattern of recreational use at Lake Tahoe, a change in structures at any site has several immediate impacts.

— It causes physical and biological changes at the site, of the sort described in the preceding sections. It also facilitates some recreational activities: piers allowed for pier fishing, boat mooring or sunbathing; groins expand the space for sunbathing.

— Other activities are made more difficult. Piers may be a hazard to navigation, groins to jogging.

The reactions of people engaged in various recreational activities to the change in structures (with their physical and biological consequences) constitute the first impact of a given change in structures on recreational use.

Impact of Intensity of Use

Given an existing pattern and volume of recreational use of the shorezone, a change in structures at one site will have regional effects on recreational use. As the site becomes more or less attractive to different user groups, the distribution of activities around the shorezone changes.

Boaters are attracted to new marinas; picnickers to areas with ample parking. A change in structures may also change the overall popularity of different shorezone activities. If piers are built near all major swimming areas, swimming may decline. Conceivably, structural changes of sufficient magnitude could cause people to cease using the shorezone altogether, or to stop coming to or living in the Tahoe Basin.

A consequence of these impacts on shorezone use is a change in the intensity of activities at any site in the shorezone. Crowding, in any activity or at any site, thus increases or declines. As extent of crowding is an important consideration in choice of recreational activities and locations, further adjustments are made by shorezone users. People who dislike crowding by people engaged in the same or other activities will move to other sites, or change the timing of their participation in a given activity.

A change in structures at any site is thus linked to changes in the pattern and volume of recreational activities throughout the shorezone, and to total use of the shorezone and the Basin.

Controlling Factors

The chain of events clearly does not proceed inevitably from a given structural change. Several controlling factors intervene.

Most important is the degree to which various users respond to the initial impacts of a structural change and to changes in intensity of use. The bulk of our research has been devoted to assessing the magnitude of responsiveness of users to this factor, and our findings are reported in Chapter IV.

A second factor is access. Given a structural change, the degree to which people will respond to it depends, in part, on the extent of current use of the site and the ease with which the site can be reached. Access at Tahoe is limited, both by physical barriers and by legal questions concerning public access to areas backed by private ownership. To an undetermined degree, shorezone structures may pose a psychological restriction to public access by implying private ownership or control over the foreshore and nearshore zones. The Shorezone Ordinance itself has a potentially direct bearing on access, as it could be interpreted as restricting intensive (public) use of environmentally sensitive beaches (see Section 5.3.4.1 for discussion).

Access considerations also include availability of parking (or mooring) and proximity to lodging and Basin gateways. These factors are particularly important at Tahoe, where parking tends to be limited, and beaches on the east and west shores are remote from the primary lodging and Basin gateways at the north and south shores.

A final controlling factor is backshore use. The availability of complimentary backshore facilities affects the relative attractiveness of a particular site. Access to hiking areas, restaurants, places of employment, or shopping areas may be particularly important.

These controlling factors will affect the magnitude of change in the pattern and intensity of shorezone use at any one time. With the passage of time, total demand for recreation uses changes as well: different activities change in popularity, total volume of shorezone users changes, as does total volume of residents and visitors in the Tahoe Basin. Demand for facilities thus changes, as does crowding, and the volume and pattern of uses change accordingly.

Application of the Model

The two surveys performed by McDonald & Grefe, Inc. allow the gauging of reactions of various user groups to a variety of structural configurations and degrees of crowding. A forecast of structural conditions at partial or maximum buildout can be converted to an assessment of first impacts of structural changes. As an example, the reactions of swimmers to an increased density of piers, etc. can be estimated.

Assessment of reactions to crowding under a given buildout scenario requires predictions of patterns and volumes of use at each site. To predict the amount of change in user activity patterns, the shifting of uses to various sites, and the response to changes in relative attractiveness and total demand, would require a level of information which does not exist. Two simpler approaches are available.

Under the first, densities of use may be assigned to structures. A given peak beach occupation (people per acre) may be assumed, a particular number of pier fishermen may be assigned to each pier, etc. This approach is expedient in requiring little additional data. However, in *assigning* use intensities, this approach yields no realistic forecast of crowding.

A second approach is to attach a time element to the buildout scenario and forecast total recreation use for a chosen point in time. This permits not only a consideration of the number of people exposed to various densities of structures, but a forecast of the degree of crowding likely to coincide with the maximum buildout scenario.

The latter approach has been used in our assessment. Exogenous forecasts of visitor levels were used to forecast the

volume of future shorezone users. This total demand was then distributed according to the location of accessible shore areas, proximity to Basin gateways and lodging, and the location of shorezone structure densities high enough to affect the pattern of shorezone use. This distribution was then compared with the supply of shorezone use areas, to forecast degrees of crowding at various sites.

The analysis of user responses to crowding, combined with the consideration of responses to shorezone structures then permitted an assessment of the implications of the maximum buildout scenario for recreation in the shorezone.

3.4.3.2 *Impacts on the Regional Economy*

Causal Factors

Defining the causal links between structural changes in the shorezone and impacts on the economy of the Tahoe region is a complicated task, as the economic impacts of the shorezone are difficult to isolate. If shorezone use were the sole reason for the presence of shorezone users in the Basin, expenditures on restaurants, motels, transportation, etc. could be considered to be functions of shorezone use. Since gaming, camping, hiking, skiing and other activities also occupy shorezone users, no simple causal relationship can be assumed.

Our approach is to concentrate on three types of direct and immediate impacts of changes in shorezone structures:

- Impacts on property tax revenues from parcels adjoining shorezone structures;
- Impacts on construction employment from the building of shorezone structures; and
- Impacts on service employment from the use of marinas.

The larger impact of shorezone use—on the level and pattern of visitor spending in the Basin—is discussed in general terms only.

The User Survey included several questions about the drought's effect on use. Use patterns have probably been altered by the current drought. One effect may be an alteration in activities at the South Shore. South Shore beaches had lower percentages than some other sites of respondents engaged in swimming as a primary activity. The extreme shallowness extending for hundreds of feet into the water probably discouraged swimming. Another effect of the drought may be in the type of boating engaged in from the Timber Cove sample site. There were noticeably fewer individuals engaged in sailing at the Timber Cove Marina (4.5 percent) than at the Sand Harbor boat ramp (27.3 percent). This was probably due to the shallowness caused by the drought, also. Timber Cove Marina, which is at the South Shore, had only about three to four feet of water under its pier, making it difficult for some sailboats to get to the marina, due to the depth of their keels. During normal use, sailboats probably use Timber Cove Marina to a much greater extent. Boating may also be underrepresented at El Dorado Recreation Area, where the drought has prevented the use of a boat launching ramp.

4.4.5.2. *Shorezone Users' Opinions: The Tahoe Shorezone User Survey*

Direct questions concerning shorezone users' reactions to structures and use densities yielded only a few firm conclusions. The User Survey asked respondents whether they would be more, or less, likely to use sites under

various conditions, and whether various facilities appeared too crowded.

User responses were grouped into three broad categories: boaters, fishermen and swimmers/sunbathers/miscellaneous. The number of fishermen in the survey is small. The reliability of the "fishermen" category, even as grouped, thus remains suspect.

As shown in Table 4-34, boaters indicated an attraction to areas with permitted water skiing, public marinas and close parking. Boaters indicated they would use an area *less* if water skiing or swimming were

Table 4-34

EFFECT OF STRUCTURES AND CONDITIONS ON BEACH USE
TAHOE SHOREZONE USER SURVEY

Beach Structures & Conditions	Likelihood of Beach Use (Percent of Those Responding)					
	Boaters		Fishermen		Swimmers/ Sunbathers Others	
	More	Less	More	Less	More	Less
Roped-off Swimming	16.7%	16.7%	40.0%	20.0%	18.4%	16.8%
Swimming Prohibited	5.6	56.9	10.0	70.0	2.4	75.8
No Piers	12.5	25.0	10.0	50.0	9.6	14.6
No Buoys	13.9	26.4	0.0	50.0	5.6	22.6
Next to Private Piers	4.2	30.6	10.0	40.0	2.7	29.8
Water Skiers Not Permitted	13.9	41.7	20.0	40.0	22.3	18.1
Water Skiers Permitted	43.1	12.5	60.0	20.0	15.7	24.2
Many Buoys	18.1	26.4	50.0	20.0	10.6	14.6
Closer Parking	30.6	16.7	20.0	20.0	35.9	9.6
Public Marina	43.1	16.7	60.0	20.0	20.7	9.6
Public Transportation	18.1	18.1	50.0	10.0	18.6	11.4
Fences at Both Ends	13.9	25.0	40.0	20.0	4.5	31.1

Source: McDonald & Grefe, Inc., 1977.

prohibited. Boaters expressed no consistent opinions concerning the imp of shorezone structures on their activities, other than support for public marinas. Twelve and one-half percent reported they would use an area more if it had no piers, and 25 percent said they would use it less. Approximately 18 percent would use an area with many buoys more, about 26 percent would use it less.

As shown in Table 4-35, the opinion that shorezone facilities are too crowded was widespread among boaters. Some, or all, public mooring sites were considered too crowded by 38.8 percent of boaters; 30.4 percent felt private mooring sites were too crowded; 38.7 percent marinas; 42.2 percent boat ramps; and 36.9 percent felt public piers were too crowded. Private piers are apparently considered to be in adequate supply; only 14.6 percent of boaters felt private piers were overcrowded.

Table 4-35

EXTENT OF CROWDEDNESS
TAHOE SHOREZONE USER SURVEY

Percent of User Groups Responding That Some or All Structure Types Are Too Crowded

Structure Type	Boaters	Fishermen	Swimmers/ Sunbathers Others
Public Mooring	38.8%	75.0%	51.3%
Private Mooring	30.4	66.7	29.3
Beaches	57.8	20.0	58.2
Public Piers	36.9	55.6	36.0
Private Piers	14.6	10.0	14.0
Picnic Areas	51.7	50.0	52.1
Marinas	58.7	66.7	37.8
Boat Ramps	42.2	66.7	40.4
Parking	63.2	88.9	63.8

Source: McDonald & Grefe, Inc., 1977.

Generally, fishermen reported that they would be more likely to use an area in which swimming was roped off, where a public marina and public transportation were available, and where water skiers were permitted. This group reported less likelihood of use in areas where swimming was prohibited altogether or where piers and buoys were absent.

Because the sample of fishermen included boat fishermen, along with fishermen from piers and the shore, probable differences in the views of each subgroup cannot be isolated. Boat fishermen, for example, may avoid areas with piers, while pier fishermen would seek such locations.

Generally, fishermen supported boaters' opinions that some or all facilities in the shorezone were overcrowded. Two-thirds of fishermen reported marinas, boat ramps and private mooring sites as too crowded; 75 percent reported overcrowding at public mooring sites. Slightly over half felt public piers were overcrowded; only 10 percent held the same opinion of private piers.

Swimmers, sunbathers and other miscellaneous shorezone users showed a fairly clear preference for areas with closer parking (35.9 percent) and with waterskiing prohibited (23.3 percent). Roped-off swimming (18.4 percent) and the provision of public transportation (18.6 percent) would also be likely to increase use at any site. A total of 31.1 percent noted that the presence of fencing (31.1 percent) would also reduce the attractiveness of a site.

No clear pattern of reactions to shorezone structures *per se* is evident, however. Sites without piers would be used more by 9.6 percent of the respondents; 14.6 percent would use such sites less. Sites with no buoys would be used more

by 5.6 percent; they would be used less by 22.6 percent. Marinas would attract 20.7 percent of the sample, and discourage 19.7 percent.

This group of shorezone users generally found facilities at Tahoe crowded, as did boaters and fishermen. Beaches were reported as overcrowded by 18.2 percent, and picnic areas by 52.1 percent. Nearly two-thirds of respondents cited parking as overcrowded. Half thought public mooring sites too crowded; 29.3 percent private mooring sites. Public piers were cited to be overcrowded by 36 percent; private piers by 14.0 percent. About 40 percent considered marinas and boat ramps overcrowded.

The User Survey thus indicated no strong pattern of reactions to shorezone structures, *per se,* other than boaters' and fishermens' attraction to areas with public marinas.

The User Survey did show that, in most cases, a majority of users felt facilities at Tahoe to be overcrowded. An additional question in the survey asked respondents whether they avoid facilities that are too crowded. The response was 77 percent in the affirmative. It thus appears that a primary determinant of user activity and enjoyment is not the density of shorezone structures, but the density of shorezone users.

This conclusion is partly supported by responses to open-ended questions included in the survey as shown in Tables 4-36 and 4-37. Respondents generally cited crowding and overdevelopment as primary impediments to their use of the shorezone. In response to a request for general comments, a plurality (39 percent) of those responding argued for protecting the ecology of Lake Tahoe, limiting development and reducing crowding. In response to a request for suggestions concerning the more efficient use of shorezone

facilities, 15 percent of respondents recommended limiting growth of crowds. Physical barriers, however, were cited by a significant number of respondents: 17.7 percent argued for more parking, 13.3 percent for more boat facilities, and 7.1 percent for more public beaches.

The survey also showed that shorezone use is responsive to restrictions on activities and to transportation facilities. Restrictions on waterskiing would tend to attract swimmers and sunbathers at the expense of boaters and fishermen. The prohibition of swimming would reduce . . .

• • •

Analysis of Recordings

As shown in Table 4-39, a pronounced pattern of reactions was exhibited to the series of recordings made at beaches with varying densities. Seventy-five percent of respondents reported they would definitely use the low-density beach. The proportion of definitely use responses drops rapidly with increasing density of use: only 9.2 percent of respondents would use the high-density beach. Similarly, only 6.2 to 10.8 percent of respondents said they would definitely use the moderate-density beaches, given the addition of barking dogs, power boats, or recorded music.

The survey also showed a pattern of tolerance for increased density or noise, however. While 90.8 percent of participatns reported that they would definitely or probably use the beach with the low-density user sounds, fully 75.4 percent would at least probably use the moderate-density beach. About 43 percent indicated at least probable use of the high-density beach. Recorded music and the sound of a passing power boat at a moderate-density beach produced

and equal level of satisfaction (defined as the sum of "probably use" and "definitely use"). The sound of a barking dog at a moderate-density beach brought user satisfaction down to 43.1 percent.

It should be noted that, while the percentage of participants who would at least probably use these latter beaches was about 40 percent in each case, the ratio of "definitely use" to "definitely try another beach" responses varied considerably among them. The greatest disparity in strong opinions occurred in response to the recording of high-density beach ("definitely dislike" to "definitely like" ratio=1.0:4.0). Moderate-density beaches with sounds of a power boat and a barking dog receive "definitely dislike" to "definitely like" ratios of 1.0:3.0 and 1.0:3.5 respectively, while the moderate-density beach with recorded music received a ratio of only 1.0:2.1.

Of the 43.0 percent of participants who would use the high-density beach, the major reason given was based on the friendly tone of the voices . . .

• • •

4.4.5.4 *Comparison of Responses of Property Owners and Nonproperty Owners*

Tables 4-41, 4-42 and 4-43 compare responses of Tahoe property owners and nonproperty owners in both the User Survey and the Perception Survey.

The patterns of responses of the two groups to the User Survey were very similar. Significant differences appeared only in reactions to private piers and water skiers. Property owners would be much more inclined to use a beach next to private piers (40.0 percent) than nonproperty owners (2.4 percent). The percentage of respondents

who would use such sites less does not differ so greatly between the two groups. About 16 percent of property owners would make less use of such beaches, versus about 24 percent of nonproperty owners. Approximately 42 percent of property owners reported they would be less inclined to use sites where water skiers were not permitted. Eighteen percent of nonproperty owners reported a similar sentiment. Thirty-three percent of property owners reported they would be more likely to use sites where water skiing was permitted, as did 14.9 percent of nonproperty owners.

Important differences were apparent in responses to the slides shown in the Perception Survey. In three of the five groups of slides, nonproperty owners showed greater sensitivity to increasing density than did property owners.

In response to the series of slides of moored boats, 28.6 percent of property owners reported disliking the slide of three boats, 23.8 percent five boats, and 37.0 percent seven boats. In contrast, 29.6 percent of nonproperty owners reported disliking the slide of three boats, 40.9 percent five boats, and 56.8 percent seven boats. Similarly, in response to the series of slides of piers not backed by buildings, 4.8 percent of property owners reported disliking the slide of one pier, 19.0 percent two piers, and 47.6 percent three piers. About 32 percent of nonproperty owners reported disliking a slide of one pier, 54.5 percent two piers and 63.6 percent three piers. The same pattern of differences ...

Table 4-41

EFFECT OF STRUCTURES AND CONDITIONS ON BEACH USE TAHOE SHOREZONE USER SURVEY

Beach Structures & Conditions	Likelihood of Beach Use (Percent of Those Responding) Property Owners More	Property Owners Less	Nonproperty Owners More	Nonproperty Owners Less
Roped-off Swimming	17.6%	17.6%	20.3%	17.2%
Swimming Prohibited	5.9	71.3	2.0	86.1
No Piers	10.9	18.8	11.1	16.6
No Buoys	11.9	27.7	4.8	26.2
Next to Private Piers	40.0	25.7	2.4	33.9
Water Skiers Not Permitted	25.9	42.3	25.2	18.0
Water Skiers Permitted	33.0	19.4	14.9	28.5
Many Buoys	13.9	23.8	12.6	15.0
Closer Parking	42.4	18.2	39.6	9.6
Public Marina	23.5	26.5	28.2	20.6
Public Transportation	21.2	16.2	22.3	13.0
Fences at Both Ends of Beach	7.0	34.0	4.9	35.8

Source: McDonald & Grefe, Inc.

• • •

CHAPTER V

ASSESSMENT OF THE MAXIMUM BUILDOUT SCENARIO

5.1 *INTRODUCTION*

This chapter presents an assessment of the cumulative effects of shorezone development under the conditions of maximum buildout of those portions of the Tahoe Shorezone under private ownership. In Section 5.2, the assumptions behind the maximum buildout scenario are identified, and the scenario is developed and presented in statistical and graphic format. Conditions under maximum buildout are compared to the present intensity and distribution of shorezone development as described in Chapter IV. In Section 5.3, the cumulative environmental and socioeconomic impacts of maximum buildout are analyzed through an application of the impact model of Chapter III to the maximum buildout scenario. As appropriate, the maximum buildout description is supplemented with statistics on population and land use developed in other analyses of the implications of the TRPA and CTRPA General Plans.

5.2 *PROJECTION OF MAXIMUM BUILDOUT*

5.2.1 METHOD OF ANALYSIS

Per the instructions of the agencies sponsoring the study, the maximum buildout scenario developed for this assessment does not reflect a projection of the market demand for shorezone structures at some particular future point in time. The analysis is not time-based in this sense because the focus of concern is the potential effects of development that could be permitted within the restrictions of the Shorezone Ordinance.

Maximum buildout is presented in a form identical to that used in Chapter IV to describe the present intensity and distribution of development in the nearshore and foreshore zones of Lake Tahoe. Descriptive statistics and maps are used to illustrate the potential changes in structure density on a shorezone tolerance district segment basis.

• • •

5.3.4 RECREATION: EFFECTS AT MAXIMUM BUILDOUT

Maximum buildout under the Shorezone Ordinance will be characterized by concentrations of piers or moored boats from Tahoe City to Brockway, near Rubicon Bay, and in other scattered sites sufficient to reduce the enjoyment of beach users, and significant reductions in public enjoyment of the shorezone due to crowding.

The extent of these impacts will depend, to an extent, upon the strictness with which the Shorezone Ordinance is applied, as well as on the outcome of current litigation over public access to shore areas backed by private land, and by the rate of increase in numbers of shorezone users. Owners of shorezone property will be less affected by crowding, but more affected by increased densities of piers and moored boats, compared to the general public.

Boaters and fishermen will generally enjoy the same degree of access to the Lake as they do now. Waterskiers, nearshore trollers and other users of the nearshore may be adversely affected by the restrictions on movement and potential navigational hazard posed by piers and buoys, particularly at the North Shore. Potential recreation and economic impacts are summarized in Table 5-14.

5.3.4.1 *Beach Users: Swimmers, Sunbathers and Other Near-Shore Users*

Swimmers, sunbathers and other beach users comprise by far the largest group of users of the shorezone and a group whose activities are both directly and indirectly affected by the Ordinance.

Impacts of Structures

The impact of shorezone structures on swimmers, sunbathers and other beach users under the maximum buildout scenario, appears significant in some areas of the Tahoe shorezone.

Under the maximum buildout scenario, 50 percent of the Tahoe shorezone has a pier density of three or more piers per thousand feet. Twenty . . .

Table 5-14

SUMMARY OF IMPACTS TO RECREATION AND THE REGIONAL ECONOMY AND SPECIFIC DATA NEEDS

Causal Factors	*Potential Impacts*	*Data Needs*
Increased Pier Density	• *Backshore Property Owners.* Minor adverse aesthetic reactions. Facilitation of boat launching, pier fishing and pier sunbathing.	
	• *Other Beach Users.* Psychological/physical barriers to public swimming, sunbathing, shore fishing, etc. on adjacent shore. Significant adverse aesthetic reactions, on the part of those within view of affected area.	
	• *Offshore Users.* Increased navigation hazard, especially to waterskiers, nearshore trollers and other nearshore users.	Extent of navigation hazard.
	• *Regional Economy.* No significant direct employment or tax base implications. Possible negative impacts on attractiveness of Tahoe as a tourist destination, with indirect economic repercussions.	Relationship of shorezone characteristics to visitor levels.
Increased Density of Moored Boats	• *Backshore Property Owners.* Minor adverse aesthetic reactions. Facilitation of boat mooring.	
	• *Other Beach Users.* Significant adverse aesthetic reactions on the part of those in view of affected area.	
	• *Offshore Users.* Increased navigation hazard, especially to nearshore users.	Extent of navigation hazard
	• *Regional Economy.* No significant direct employment or tax base implications. Possible negative impacts on attractiveness of Tahoe as a tourist destination, with indirect economic repercussions.	Relationship of shorezone characteristics to visitor levels.

Table 5-14 (Continued)

Causal Factors	*Potential Impacts*	*Data Needs*
Presence of Revetments, Bulkheads	• *Backshore Property Owners.* Expansion or protection of private beach area. Facilitates sunbathing, shore fishing.	
	• *Other Beach Users.* Effective elimination of area below high water mark; thus elimination of public access for sunbathing, shore fishing, etc.	
	• *Regional Economy.* No significant direct employment or tax base implications. Possible negative impacts on attractiveness of Tahoe as a tourist destination, with indirect economic repercussions.	Relationship of shorezone characteristics to visitor levels.
Presence of Groins	• *Backshore Property Owners.* Expansion of area available for beach use in immediate area; possible reduction downshore.	
	• *Other Beach Users.* Expansion of immediate beach area, and possible reduction downshore; impact on beach users depends on access.	
	• *Offshore Users.* Possible navigational hazards from groins, if protruding.	Extent of navigation hazard.
	• *Regional Economy.* No significant direct employment or tax base implications. Possible negative impacts on attractiveness of Tahoe as a tourist destination, with indirect economic repercussions.	Relationship of shorezone characteristics to visitor levels.
Increased Foreshore crowding	• *Backshore Property Owners.* Unlikely to be affected.	
	• *Other Beach Users.* Significant reduction in enjoyment of beach use.	
	• *Regional Economy.* Adverse reaction to crowding places ceiling on number of visitors potentially attracted to Tahoe shorezone.	Relationship of shorezone characteristics to visitor levels.

Source: McDonald & Grefe, Inc.

• • •

. . . is permitted by the Ordinance tend to be near populated areas and the gateways to the Basin. Incline, Brockway, Cornelian Bay, Tahoe City, Tahoe Pines, Homewood and Tahoma all front on shorezones in tolerance districts 6 through 8. The low-tolerance shorezones of north Tahoe are primarily in the unpopulated and remote Nevada side, south of Incline. The balance between permitted beach intensity and ease of access is reversed in the southern half of the Basin, however. The beaches where intensive use is permitted are concentrated in the relatively remote Sugar Pine Point and Emerald Bay areas on the California side and to the north of Zephyr Cove on the Nevada side. In the heavily populated 6.2 mile strip from Camp Richardson to Nevada Beach, no high-intensity use is permitted by the Ordinance.

High structure densities would influence the location of public beach users only to the extent the public has access to shore areas backed by private ownership. (As noted earlier, maximum buildout assumes shorezone structures will occur only at privately backed parcels.) If general public access to the foreshore in such areas were increased, the high densities of structures could then have a greater effect on public use. By implying private control over the shoreline, concentrations of private structures may act as a psychological deterrent to public use of the foreshore and nearshore.

Densities under maximum buildout are thus likely to vary from the levels that would exist if all beach users were evenly distributed on all public beaches. In particular, if the Shorezone Ordinance's restrictions on intensive beach

use were applied to public lands, densities of users would drop dramatically at 60 percent of beaches, while skyrocketing at the remaining 40 percent.

5.3.4.2 *Boaters*

Access and Mooring

Launching, mooring and storage facilities for boats are permitted without major qualifications in tolerance districts 6, 7 and 8, comprising 14 percent of the shorezone and including sites near all major gateways in the Basin and all major population centers. As these facilities require a relatively narrow strip of shorezone per user, maximum buildout under the Shorezone Ordinance is unlikely to see any absolute restriction on boat access to the Lake, provided boaters are willing to . . .

* * *

. . . to aesthetic impacts. The physical shoreline impacts of T or L-shaped piers would be related directly to their impermeability and the degree of wave energy reduction they produce.

6.3.2 IMPERMEABLE PIERS AND SHORELINE PROTECTIVE STRUCTURES

The Shorezone Ordinance requires pilings on a pier to be spaced such that the supporting structure is a least 90% open to the passage of water and littoral sediments. Protective structures such as groins and breakwaters are required to be permeable in nature. This permeability is a relative requirement; the basic function of these structures is based on a certain degree of interference with wave energy and littoral processes. *The Shore Protection Manual* (U.S. Army Coastal Engineering Research Center,

1973) offers design guidelines and references for relatively permeable protective structures. In general, impermeable structures which are found at the Lake have the potential to interfere with littoral drift. Because of this problem a general requirement for structure permeability is desirable if the possibility of downdrift beach erosion is to be minimized. Caution must be exercised in applying this requirement universally, inasmuch as the conditions which control littoral processes vary considerably from site to site in the shorezone. Under some circumstances, impermeable shorezone structures will have little effect on the stability of adjacent stretches of the shoreline.

6.3.3 FENCES

Fences extending from backshore property lines down to the low water elevation are not uncommon at Lake Tahoe. Our survey indicates that fences are present at one or both ends of at least 11 of the 36 public beaches identified in Table 4-17. These fences create very significant constraints to free public movement along the foreshore.

It appears that the enclosure of a beach by fences would reduce the enjoyment of a significant number of shorezone users. About 31 percent of swimmers, sunbathers and other beach users interviewed in the User Survey reported they would use sites enclosed by fences less and only 4.5 percent reported increased likelihood of use of such sites.

The Perception Survey also showed a strong pattern of adverse reaction to fences. In a series of slides of five types of fences, ranging from a line of widely spaced poles to a six-foot wooden fence, proportions of dislike ranged from 44.6 percent to 81.5 percent. A wooden-pole fence was best received, with 32.3 percent of respondents approving. A

five-foot-three-inch wooden fence and a steel-pole fence received the lowest ratings, with 7.7 percent and 6.2 percent of respondents, respectively, reporting approval.

At the public information meeting held at the North Shore where the consultants' preliminary findings were presented, comments were received from several littoral property owners concerning the issue of fences. These individuals expressed the concern that public use of the foreshore adjacent to their property would result in a variety of problems associated with trespassing in the backshore. A major concern related to the problem of property owner liability in situations where public access to privately-owned piers resulted in personal injury. Fences were seen by property owners as a viable means of restricting property damage, litter, and the chances of personal injuries on private structures.

These issues have been recognized by at least one public agency concerned with ensuring public access to the Shorezone. The C.T.R.P.A., in its 1977 *Shoreline Access Study*, has made a number of specific recommendations concerning the necessity of adequate signing, the posting of warnings, and maintenance and upkeep at sites where conflicts between public and private use of the Shorezone could arise.

Volume 5 • Number 1/2
1979

COASTAL ZONE
MANAGEMENT
JOURNAL

Environment
Resources
and Law

Marc J. Hershman
EDITOR-IN-CHIEF

Crane, Russak & Company, Inc., New York

Public Access to Ocean Beaches: If You Find a Parking Space, How Do You Get to the Beach?

David J. Brower

Associate Director, Center for Urban and Regional Studies, University of North Carolina at Chapel Hill

William Dreyfoos

Staff Attorney, Joint Center for Environmental and Urban Problems, Florida Atlantic University —Florida International University, Fort Lauderdale, Florida

The public presently owns, or has the right to use, a substantial portion of the nation's ocean beaches. However, the public cannot, in fact, use many of these beaches because there is no legal access to them. As the coast develops, more and more areas become closed to the public. The states are now being encouraged to plan for access to the beaches; there are a number of tools and techniques at their disposal.

Jaws notwithstanding, the demand for beach and ocean recreation has grown at a rapid pace, and by all accounts will continue to increase for the foreseeable future.[1] At the same time, ocean beaches that the public has the legal right to use and that the public can get to as a matter of right

---

[1]Footnotes omitted in printing.

are shrinking.[2] Anthony Wolff put the problem vividly and, we believe, without exaggeration:

> On holidays, many spend the day oozing along the coast from one public beach to the next in a vain search for a parking place. The lucky ones end up herded together on the sand like seals in a rookery, oiled and broiling in indecent proximity to the whole population they presumably came so far to get away from[3]

Senator Henry M. Jackson described what he called "signs of the times": No Trespassing, Private Beach/ Private Property, Keep Out, and Lots for Sale.[4] This problem of shrinking beach and ocean recreation opportunities is twofold: (1) the beaches themselves, and (2) public access to the beaches (that is, the opportunity for the public to move freely onto and off the beaches). We believe access is the more important issue, since the determination of which beach areas are to be used by the public depends on what beaches can be freely reached.

The public already owns a substantial portion of all beach area in the United States. Except for preservation of a few natural areas, however, the public at large is receiving little benefit, if it is denied access to the beaches it has the legal right to use.

The whole notion of public access to beaches was made more current in 1976 when Congress added an amendment to the Coastal Zone Management Act, which states:

> The (coastal zone) management program for each coastal state shall include . . . a planning process for . . . access to public beaches.[5]

Definitions

Three physical and legally distinct portions of the beach can be distinguished:

1. The *wet sand*, also known as the intertidal zone, designates that portion of the sand lying between mean lowtide and mean hightide[6] (in other words, the area of the beach exposed at lowtide and covered by water at hightide). In much of the legal literature, this zone is termed the *foreshore*.[7]

2. The *dry sand* refers to that portion of the beach between the mean hightide line and the dunes.[8] This area of the beach is generally covered by water only during storms, if at all. The exact demarcation of the dune line may vary from state to state, but for general purposes it can be identified as the vegetation line.[9] Both the wet sand and the dry sand are actively used for recreation purposes.

3. The *uplands* refers to the land shoreward of the dune line or vegetation line.[10] This area is usually included in the definition of the beach, especially where rocks or cliffs constitute the shoreline.

In terms of public use of beaches, all three areas must be considered, although for purposes of planning for access the term "beach" might usefully be defined as the wet sand alone.

Present Ownership

Wet Sand

In 17 of the 23 coastal states, the wet sand or foreshore is publicly owned.[11] In the remaining six states, the foreshore is privately owned, which generally means that the littoral property owners hold the beach down to the lowtide line.[12]

In most states in which the foreshore is publicly owned, this ownership is derived through the public trust doctrine.[13] Under this doctrine, the state does not own the foreshore in the normal proprietary sense, but rather holds the land in trust for the benefit of its citizens. As a result, the state can sell the foreshore only subject to the trust.[14]

A publicly owned foreshore is a long, narrow strip of immensely valuable land which the public has the right to use. However, public use of the foreshore is subject to some practical difficulties. Foremost among these problems is access—that is, the ability of the public to cross the other two sections of the beach in order to reach the beach as a recreation resource at hightide. At hightide, the foreshore as legally delimited may be covered by the ocean at certain times.[15] This means that such activities as sunbathing, walking along the beach, and beach play will, of necessity, occur on the dry sand, which generally is privately owned. Hence, beach users may be trespassing on private property at hightide. Although this problem may be more theoretical than real—that is, the foreshore *can* be used for these activities most of the time—the point is that public ownership of the foreshore alone does not ensure the public's legal accessibility to the beach and ocean as a recreational resource.[16]

Dry Sand

In most states, the dry sand is privately owned, but there are notable exceptions. In Oregon, Hawaii, and the Virgin Islands, public ownership of the dry sand has also been established.[19] In other states, the public may have established an incipient right to use the dry sand, which can be perfected through litigation. (The Texas Open Beaches statute,[17] passed in 1959, in effect establishes for the public a presumptive right to use all beach area within 200 ft of the mean lowtide line.[18] Courts in many states have adopted evidentiary rules, which can help establish these rights in the dry sand.[20]

We may be moving toward recognition of a public right to use the dry sand, if not outright ownership of it, but private ownerhhip is still the rule in most states.

Uplands

In all states, the uplands are privately owned, unless a government unit has acquired specific areas. In some cases, the public has purchased areas to be used as parks, military facilities, and the like. In other cases, the public has acquired areas through dedication, prescription, and similar legal mechanisms. However, by far most of the uplands remain in private ownership.

Planning for Access

The public using local beaches is generally far greater in number than is the local population. In many ways, the nonresident beach user has different recreational needs than does the resident beach user. Transportation and parking are much more of a problem. Similarly, the nonresident user requires more support activities, such as camping areas, picnic facilities, bath houses, and so forth.

This difference in the recreational needs of different user groups is compounded under a policy of providing sufficient public access to the beaches to meet the public demand. Meeting local beach use needs will normally be relatively simple and inexpensive. However, the additional demands made by nonresidents will increase the amount of beach area to which access is needed; as a result, increased effort and expenditure by government is recovered. The problem is: Which level of government?

At the local level, the usual emphasis in facility planning centers around meeting local needs. Although these

needs may encompass planning to satisfy some segments of the nonresident group of beach users with accommodations, restaurants, pavilions, and parking, local governments may be reluctant to expend large amounts of money to provide access areas for all nonresidents. And often for good reasons, it is argued that the casual nonresident user contributes little to the local economy and may actually impose burdens in the form of increased trash and litter, law enforcement problems, traffic, and the like. In addition, it is feared that this type of casual user will "drive out" the more affluent tourist, who will stay in a motel, eat in restaurants, patronize gift shops, and in other ways contribute to the local economy.

Nevertheless, the state has, or should have, an interest in seeing that those of its residents who do not live on the coast, as well as tourists in the state, have sufficient beach resources available to them on a day-visit basis. To meet this need, the state may concentrate on providing parks, camping facilities, and other facilities within short driving distances to concentrations of population. The state perspective will thus tend to emphasize the acquisition of large tracts of land or relatively high-density recreation areas. In contrast, the local governmental interest may be more likely to concentrate on smaller, less dense beaches that serve the needs of local residents, but that may not meet the recreational needs of the nonresident user.

In short, the type of public access needed for beach recreation will vary from user group to user group. As a result, the responses that can be anticipated from different levels of government will also vary. Although the interests of state and local governments will not necessarily conflict,

neither will they necessarily agree or coordinate with each other, unless there is effective, coordinated planning at both the state and local levels.

Any planning process for beach access should start with an inventory of existing accessways which the public has the right to use. Combined with projections of beach use demand, allocated by type of user, the inventory can indicate whether or not an access problem exists, and which acquisition strategies would be most useful to the unit or local government in question. As the discussion of these strategies has indicated, access acquisition can proceed at the local level independent of the broad purchase or condemnation programs that may be necessary to provide recreational opportunities specifically for non-local residents. However, any broad program for access acquisition must involve coordinated planning efforts and implementation by state and local governments. Local governments should ensure that the location and type of recreational facilities provided by the state will not disrupt local land-use patterns and activities. State governments should ensure that any state or federal money spent is used for expanding the recreational opportunities available to non-local as well as local users. A coordinated approach to beach access and the provision of public beach recreational facilities is accordingly desirable in order to maximize the benefits to the public of governmental activities designed to secure access.

It is important that beach access planning be coordinated with existing programs affecting coastal land use. Access planning must take into account the environmental impacts of concentrating large numbers of people in small,

often fragile areas, and should coordinate with programs involving the preservation of wetlands and other areas of environmental concern. Similarly, access planning must take cognizance of the recent boom in coastal development, particularly residential development. It would be politically difficult, and probably unnecessary, to attempt to provide public access through all residential areas. Public and private uses of the beach can coexist. Access and acquisition planning should take cognizance of these factors, but should emphasize the public's right to beach recreation, and the public's interest in being able to use the public beach as well.[21]

The Access Problems

As discussed earlier, the prevalent pattern of beach ownership involves public ownership of the foreshore and private ownership of the dry sand and uplands. To reach the land/water interface (e.g., from a public road), the public must first gain access across the privately owned upland area. The point is simply that anyone who is unable to cross privately owned uplands to get from a public road down to the lower portions of the beach, is effecively precluded from using that portion of the beach. Accordingly, to the extent that the uplands remain in private ownership, without provision for public access across them, the lower portion of that beach is effectively removed from the public as an available recreational resource. In a legal context, the issue boils down to ownership of proprietary rights—that is, who owns the different portions of the beach, and who owns the right either to use or cross over them, or both.

Given the present pattern of private ownership of the dry sand and uplands area, What can be done to open up corridors or other areas to the oceanfront? It should be reiterated that access involves the availability to the public of beaches. This definition of the access problem leads to two important points. The first is that the public currently does have the right of access to many beaches.[22] Examples of such areas include municipal beaches, state parks, and national seashores, as well as beaches served by accessways, such as dedicated rights-of-way and streets. It should be remembered that the type of access with which we are concerned involves the public's *right* of ingress to, and egress from, the beach. This right is clearly distinguishable from permissive use of private property by the public as a means of getting to the beach. For instance, beachfront property owners who set up a pavillion and invite members of the public to park, use their facilities, and walk over their property to get to the beach do not give the public a right to use their property, and may withdraw their permission at any time. Given this caveat, there are, nevertheless, a substantial number of beaches to which the public currently has access. The problem is that there are not enough, and that existing access is not always located convenient to the recreating public.[23]

The second point is that although more beach access is needed, this does not necessarily mean that all the uplands or even the dry sand need to be open for the public to have access to the rest of the beach.[24] Littoral owners have proprietary rights that must be protected. Increased public access can and should be coordinated with private use of the beach, and public utilization of beach areas need not interfere with littoral owners' enjoyment of their land.[25]

Local governments should be selective in choosing accessways for acquisition compatible with both public and private use. Moreover, once public accessways have been acquired, public management and maintenance of beaches and accessways is essential to continued use and enjoyment of the beach by both littoral owners and the public. With regard to the protection of private rights and uses, a beach-access program accordingly involves maintenance and management, as well as the initial acquisition effort.[26]

Means of Gaining Access

An often over looked point in access planning is that there may currently exist a number of potential accessways in which the public has, or can easily acquire, proprietary right. Examples of such areas include rights-of-way leading down to the foreshore, which have been offered for dedication to the public, but not yet accepted by the appropriate governmental body.[27] A check of the titles of beachfront property may show similar instances in which the public can perfect title to accessways. Similarly, there may exist areas currently dedicated to the public which are neither used nor maintained by the governmental body, and hence may be subject to having dedication withdrawn.[28] The public right in this type of property can be preserved through adequate maintenance and management of the beach itself and the accessway that provides access. In many communities, access problems can be substantially alleviated by such perfection and preservation measures which involve discovering who currently has rights of access and use, and then acting accordingly.[29] These generally will be less costly than outright acquisition measures, will be easier to implement, and will be quicker to bring

about increased public access to beach and ocean recreational resources.

In addition to the perfection and preservation techniques discussed earlier, there are two approaches that can be used for acquiring beach access. One is legislation. The other involves the combination of expenditures and the use of real property law techniques by local or state governments, or both, to establish the public's right to use specific parcels of property for access purposes.

State Legislation

The legislation approach to the acquisition of beach access is exemplified by the Texas Open Beach Statute,[30] which has been in effect since 1959. The statute is predicated upon the right of the public to free and unrestricted use and enjoyment of the beach. The central portions of the Act involve public rights in the foreshore and dry sand. Using the legal mechanism of presumptions of public use rights, the Act essentially establishes public rights of use for the portion of the beach between the mean lowtide line and the vegetation line, i.e., the foreshore and the dry sand.[31] Where there is no clearly marked line of vegetation, or where vegetation has been destroyed (e.g., by destruction of the dunes), the statute gives the public right of use for 200 ft landward of the mean lowtide line.[32] The Texas statute thus essentially gives the public the right to use the foreshore and dry sand for recreation purposes. Local regulation of the public beach is authorized under the statute.

The statute does nothing about providing access across the uplands. Although the Act announces a public policy

favoring free and unrestricted ingress to and egress from the state-owned beach, the policy is satisfied by existing accessways and those which may be acquired in the future.[33] In other words, the public is not given a right to cross the uplands to reach the beach. The Texas statute thus opens the beach to the recreating public, but it fails to increase public access to it. Whether this approach would work in other states depends on whether there has been enough historical use for the courts to uphold such a statute. States considering legislative solutions to the access problem might consider . . .

Proceedings of a Forum on

RECREATIONAL ACCESS TO THE COASTAL ZONE

BEACH RECREATION PLANNING FOR DEVELOPED COASTLINES

WILLIAM W. DREYFOOS is Economic Development Planner, Berkeley Charleston Dorchester Council of Government, County of Charleston, South Carolina.

In the past few years, a substantial literature has amassed on the topic of recreational access. Those who frequent the literature will discover exhortations to increase access,[1] methodologies for acquiring access,[2] and suggested governmental programs to achieve the goal of more public access.[3] Scanning the list of governmental access activities, one finds studies of access problems, access planning in states like California and Oregon, and access purchase programs and dedication requirements in many state and local jurisdictions. Increasingly, both the literature and governmental programs demonstrate a tendency to treat beach recreation planning and access acquisition as synonymous activities, characterized by the following presuppositions:

1. Land is available for acquisition
2. Access acquisition necessarily results in more and better quality recreation for more people
3. Access acquisition is worth what it costs

Success of governmental activities is measured quantitatively, in terms of numbers of accessways or miles of

coastline open to the public. The emphasis of beach recreation planning has become a narrow, acquisitive one, focused on access.

This "more is better" approach to recreational access misses two important points concerning beach recreation. First, access is a tool, not an end in itself. In other words, access and recreation are not synonymous. Access is the means of getting people from where they are to where they want to recreate. Access thus is necessary to make beach recreation possible; but once people get to the beach, their recreational experiences are affected by a number of site and use characteristics which probably do not include access.

The second point is that the acquisitive approach to beach recreation is generally inapplicable to the developed coastline. In areas such as south Florida, southern California, and portions of New England, the mid-Atlantic and the Great Lake states,

1. Land is either unavailable for acquisition or redevelopment, or costs more than government can readily afford.
2. Most access acquisitions will serve limited populations unless coupled with substantial transportation improvements.
3. The cost of access acquisition coupled with service and maintenance costs, may stretch governmental resources over too many recreation sites to provide the public with high quality recreation opportunities; in other words, the tradeoff between number and quality of recreation areas may make access acquisition a poor way to spend available recreation monies.

Beach recreation in developed coastal areas is frequently characterized by the heavy use of limited areas (e.g., beach parks) and fiscal constraints on governmental operation and maintenance programs. These characteristics suggest a need to enhance and expand the recreation experiences available to the public along developed coastlines. However, the development patterns that engender these conditions also preclude the use of access acquisition as a major strategy for improving beach recreation in developed areas.

Faced with this situation, some governments, in developed coastal communities have initiated non-acquisitive approach to beach recreation planning. Traditional approaches to the access issue start with an enumeration of the various components of usable access: parking areas, roads fairly free from congestion, support facilities (e.g., restrooms) and services (e.g., lifeguards), and so forth. In this approach access planning becomes a game of balancing land and facility acquisition (capital expenses) against the acquisition of new services (operating expenses) to enhance the quality of the recreational experience. The focus is acquisitive.

In contrast, beach recreation planning in developed communities seems to have a different starting point. More closely resembling the rational planning process, this approach begins with an identification of beach users, their problems in securing quality beach recreation, and ways in which government might help resolve these problems. The focus is on making better use of existing recreation opportunities. This approach often involves the components of usable access listed above, emphasizing the quality of

beach users' recreation experiences. At times, acquisition of accessways may be important, but use of this one strategy is limited to corrections of particular recreation problems. The focus is placed on recreation management, and community efforts are tailored to the local recreation situation. This approach is broader than the acquisitive one, and governmental responses are more varied and complex. Communities that have turned to the management approach have developed a wide array of strategies for improving beach recreation experiences. While developed in communities where the acquisitive approach is generally infeasible, the following management techniques can be applied to all beach recreation areas:

Beach Recreation Planning

Beach recreation planning can provide the governmental framework for implementing beach recreation management strategies. This kind of planning involves everything that impacts on the availability, quality and variety of recreation experiences available to the public. Good beach recreation planning will produce citizen and governmental commitment to a beach recreation program, in which problems are identified and analyzed, management techniques are selected, and a governmental actions are prioritized.

An important component of beach recreation planning involves access. Beach recreation programs should deal with a variety of issues related to ingress and egress, including:

1. Preservation of existing access
2. Making better use of existing access

3. Acquisition of new accessways
4. Acquisition of parking areas proximate to accessways
5. Improving transportation systems to make available access more accessible to more people such as those lacking automobile transportation

The exact focus of any particular beach access planning program will depend on the local situation, what the local access problems are, and how these can best be addressed within the available financial resources. Each of these components may be relevant to a given access problem. And conversely, acquisition may be of negligible importance in access planning, or in the larger picture of recreation management involves many different subjects, only one of which is access, and access itself involves a number of concerns, only one of which is acquisition.

Beach recreation planning, as opposed to access acquisition planning, is not a widespread phenomenon, but it is increasing in developed coastal areas. One hope for California's LCP program is that it will broaden its focus once the initial round of acquisition planning has been completed.

Reducing Congestion

A number of different kinds of congestion may characterize beach recreation along developed coastlines: beaches are crowded, parking lots are full, and roads leading to the beach are congested. Congestion is generally perceived to reduce the quality of beach recreation experiences. This is particularly true of the traffic encountered in trying to get to and from the beach.

One approach to resolve the congestion problem is to spread out the beach goers, i.e., have them go to different beaches. This strategy has been used with some success in south Florida. Researchers have found that while most residents and tourists know about the popular local beaches, many are unaware that other high quality, well accessed beach recreation opportunities exist in the same vicinity. The key here seems to be publicity. Periodic newspaper features, with maps of accessways and descriptions of support service/facilities available, make the resident population more aware of recreation opportunities at places where tourists are less likely to frequent. In some communities, hotels, motels and restaurants give tourist patrons Chamber of Commerce maps showing some (but not all) of the accessways and recreation facilities available. These strategies have proved successful in reducing the number of people frequenting any particular location. As a result, traffic congestion and parking problems have been reduced at the most popular beaches.

Other kinds of congestion may result from site design problems associated with accessways. At beach parks, for instance, one often observes people crowded on the beach near the spot where the walkways hits the beach. In parks were crowding occurs, one solution is to build more walkways. This simple solution seems to work surprisingly well at large beachfront parks, where people use the walkway nearest to their parking space. Because congestion problems are generally perceptual, management strategies involving landscaping and separating different uses may also yield surprisingly successful results.

Solutions to congestion problems usually involve good problem identification and imagination. At times, expensive management solutions such as land acquisition may be the only meaningful choice, but experience shows that many problems can be remedied with good staff work and less costly techniques.

Transit

In highly populated areas, transit may be a feasible strategy for helping people reach the beach. Transit can be attractive because it saves energy costs for the beach user, it can make beach recreation available to those without cars (e.g., the poor and the elderly), and it relieves both congestion and the beach goer's tensions associated with diving and finding a parking space. However, transit must be physically attractive, affordable and timely if it is to be successful. As a result, few developed coastal areas have any meaningful beach recreation transit.

One transit mode often mentioned regarding beach recreation is the shuttle bus. Shuttle systems require convenient inland parking, low prices and frequent trips. They have been studied in a number of areas. The only rumor of an operating beach shuttle system places it somewhere in New Jersey. The literature suggests that shuttle systems *should* work, given the right location. Several Florida communities which lack adequate beach area parking are exploring the use of shuttle buses running from the mainland to the beach. Perhaps these efforts will demonstrate the successful use of a beach shuttle.

Financing Support Facilities, Services and Maintenance

Many people measure the quality of beach recreation experiences by the availability of support facilities (e.g., restrooms and snackbars), services (e.g., lifeguards) and

beach/accessway maintenance. These operating expenses can be very costly. As a result, programs to enhance beach recreation must recognize the problem of financing these amenities.

User fees can be a major way of paying for the accoutrements to beach recreation. The easiest way of collecting user fees is to concentrate restroom, picnic, playground and similar facilities in areas where a parking fee is charged. The parking fee can be used to help defray the cost of facilities and services. Fees charged need not be high —the idea is to cover only part, not all, of the cost of beach recreation amenities. This technique has proved very successful, and is commonly used, in south Florida.

Intergovernmental Coordination

Innovative techniques can often make quality beach recreation available to a wider recreating public. One such technique involves cooperation between inland and coastal jurisdictions. Cooperating governments have jointly developed a number of beach parks in south Florida. A system of differential parking fees allows residents of both the inland and the coastal jurisdiction to use the facilities for a cost below that charged the general public. This system developed from disputes between inland and coastal jurisdictions, when the latter objected to bearing the brunt of infrastruction services demanded by the inland beach users. Through governmental cooperation, the fiscal problems of the shorefront community have been eased, and the beach recreation experiences available to the residents of both communities have been enhanced.

COMPREHENSIVE OCEAN AREA PLAN

RECREATION

Regardless of the definition of recreation used, the coastal zone is unquestionably one of the major suppliers of recreational opportunities in California. Some 54,000 acres, or ten percent of the total land within the coastal inventory zone (not including State submerged lands), is currently owned and managed by public agencies for recreational purposes; however, the total demand for land for coastal zone recreation exceeds the supply. As an example of this tremendous recreation of pressure on the coastal zone, more than 127,000,000 recreation days were spent at the State's shoreline in 1970. In addition to the more active forms of recreation, there were untold millions of persons who enjoyed the coastal zone by simply sightseeing from their cars as they traveled along shoreline highways.

Of all the actual and potential uses of the coastal zone, the problem of providing recreation is one of the most critical. The meeting of land and sea has been of great inspirational significance in man's development throughout history. This deep meaning which is attached to the sea gives it importance as an area to be visited and enjoyed for its aesthetic, psychic and recreational value. Unfortunately, these values are difficult to quantify in dollar estimates.

In most cases, the primary demand for ocean-oriented recreation is concentrated in areas within and adjacent to the major urban centers of the State. Also, present trends indicate that recreation pressure on the coastal zone will intensify in the years ahead. At the same time, if current trends continue, many shoreline areas will become less

accessible to the public because of the interposition of residential and other developments. It also seems clear that the problems of meeting future demands can be met only partially by public agencies with existing levels of funding and current management concepts.

Problems

Problems facing recreation in the coastal zone may be placed into one of four categories:

1. Those created by an increase in demand for recreation resources.
2. Those related to the decreasing quality of, or access to, the finite supply of recreational resources of the coastal zone.
3. Fiscal problems.
4. The problems relating to the organization of, and coordination between, the various public agencies that have an effect or influence on recreation.

From the Matrix Figure 9, of Past and Existing Relationships of Recreation Activities to the Coastal Zone, it is clear that not all the coastal zone has been suitable for all recreational activities. Location criteria may not have been met in all places. As indicated above, economic and social trends show that there will be no lessening of the recreational demand placed upon the coastal zone resources in the foreseeable future. In fact, the overall demand for outdoor recreation is growing faster than the population and has already led to significant deficiencies in the supply of opportunities for certain types of recreational activities

By 1980, the annual total days of recreational use of the State's shoreline will have increased to an estimated 177,000,000 days. Projection of future needs for the preservation of the natural environment of the coastal zone is more difficult to quantify than the recreational demand. Nevertheless, it seems clear that a rapidly increasing number of persons will desire the opportunity to enjoy the environmental amenities of the coastal zone in the years ahead. With respect to opportunities for more active recreation, it is estimated by the Department of Parks and Recreation that the present supply of effective public swimming beach is adequate to meet demand for swimming, wading, surfing, or just relaxing on the beach through 1980 if sufficient parking is developed. If the recreationist is willing to travel up to two hours, there also appear to be adequate opportunities for fishing and skin and scuba diving in the coastal zone through 1980. The deficiencies in public recreation are in the area of boating, sightseeing, study and camping.

There are many private suppliers of recreational opportunities within the coastal zone. Typically, the private supplier has objectives different from those of public agencies, and the preservation of environmental, natural and historical features, while certainly in the public's long term interests, is generally not a goal of the private recreation entrepreneur. Besides duplicating the services provided by public agencies to a certain extent (berthing facilities, campgrounds, picnic areas, etc.), the private sector provides such things as ocean-oriented amusement centers, party boat fishing excursions, boat rentals, and

overnight accommodations. To meet the future recreational needs, it will be necessary for even greater investment by the private sector in coastal zone recreational facilities.

At this time there are no firm guidelines for recreational responsibilities of the various levels of government managing California's coastal zone lands. With respect to the provision of recreational opportunities within the coastal zone, it is frequently evident that little coordination exists between the various public agencies, as well as between those agencies and the private sector. Not infrequently, public and private organizations find themselves neglecting areas of recreational needs, or even competing with one another.

There are, in addition to problems of an existing shortage of public park land and facilities, other factors which diminish the recreational potential of California's coastline. Such things as blocking the visual access to scenic areas of the shoreline, water and air pollution, erosion of beaches (both natural and man-caused), and the irreversible modification of coastline topography and environment by development of various types, diminish both the supply of coastline available to the public and, therefore, its recreational value.

There is also the serious problem of the rapid conversion of irreplaceable and unique natural and historic areas to uses which are only marginally dependent on the coastal zone.

Another major problem related to the supply of shoreline for recreational use is one of access. All tide and submerged lands from the ordinary high water mark to the federally controlled waters (the three-mile limit) belong

to all the present and future citizens of California. However, expanding residential and other types of developments are in many areas effectively barring the public's physical and visual access to the State-owned tide and submerged lands. Obviously, without access to the shoreline, only limited types of recreation can take place.

Perhaps one of the most serious problems related to the recreational use of the coastal zone is an apparent lack of appreciation by many governmental decision makers for the unique physical environment and the long-term recreational value present in the coastal zone. Often decisions having a permanent impact on the coastal zone are based only upon the short-term and parochial economic gains that will accrue to some level of government. The fact that the recreational and environmental values of the coastline are irreplaceable resources with tremendous potential for the long term benefit of society does not normally receive adequate consideration in the decision making process. This situation is a result of the fact that recreation often does not benefit someone in a direct economic sense. Therefore, insufficient value may be attributed to the recreational experience by public decision makers.

Directly connected to this latter point is the lack of public commitment, as evidenced by the low priorities for funding to acquire public rights to those lands most suitable for recreational purposes. While agencies are waiting for funds, the price of coastal zone properties is rapidly being escalated by persons and organizations investing in lands with a potential for residential development. Often these are lands with the greatest recreational values located closest to the metropolitan areas. Efforts and regulations

used by local governments to control price escalation have often failed in curbing the speculation and development of those coastal zone properties most suitable for public recreation.

The fact is that the so-called "nonmarket" recreational uses of the coastal zone seem to be in a difficult position when competing for land in the coastal zone. Coastal zone outdoor recreation is for the most part not substitutable by recreation elsewhere. However, few market-derived values for recreation are available, so this highly dependent use is in a very poor position when competing with other users of coastal zone land.

To better understand coastal zone recreation and its economic problems, the following discussion of the most intensively used type of the State recreational facilities—the ocean-oriented park—is included. The major reason for this examination is to illustrate the approximate economic value of coastal zone lands used for recreation.

State Beaches & Parks in the Coastal Zone—A Value Estimate

Along the California coastline are more than 80 units of the State Park System, occupying about 51,000 acres and attracting (in 1969) about 23,500,000 recreation days per year. This does not include twelve State beaches in the Los Angeles area and another six in the San Francisco area which are owned by the State and operated by local authorities. Additionally, there are many other small county and city parks in the coastal zone, often heavily used, which are excluded from consideration here.

On a very crude average basis, each acre of State Park in the coastal zone thus provided about 460 recreation days of use during 1969. It can be seen that even if a day's recreation near the beach were to be valued at $1.00 per day, this would imply that each acre would be providing $460.00 of "income" per year.

However, such rough average estimates can lose some meaning in the generalizing process. For example, each State Park normally provides opportunities for a number of different kinds of activities such as horseback riding, boating and fishing.

. . . the purchase of individual lots, such as the "balloon" payment method, are proposed. Furthermore the buyer's period during which he may, without cause, rescind the contract of sale, is extended from two days to two weeks. (Cal. Bus. & Prof. Code 11028.)

As mentioned earlier, land projects are inherently likely to be "premature". All of the new provisions for land projects mentioned above will tend to prevent or deter such projects when they are premature. These controls are exercised at the State level and could act as a check against possible noncompliance with similar provisions by local governments.

Increased State involvement in local land use decision making is also reflected in the new requirement that cities and counties shall not approve land projects until the city or county has requested an environmental impact report from the State. (Cal. Bus. & Prof. Code 11550.1 Stats 1971 Ch. 1327.)

The California Environmental Act of 1970 required reports or findings by state and local agencies regarding the environmental consequences of THEIR proposed projects where the proposed project could have a "significant" impact on the environment. (Cal. Pub. Res. Code 2100-21151.) The Act did not require environmental impact reports from PRIVATE developers or subdividers. Chapter 1327 places the burden for preparing environmental impact reports for proposed subdivisions upon the State. Cities

and counties may request an impact report prior to approving a subdivision, but when the subdivision has been designated a land project, they may not approve the tentative map until an impact report has been requested. It is probable that the city or county may condition approval of a tentative map for a land project upon the receipt of a non-adverse environmental impact report from the state. On the other hand, under the present law a city or county would not be bound by the findings of the impact report prepared by the State.

STATE LAND USE PLANNING AND REGULATION

Several states including Hawaii, Vermont and Maine have enacted measures to increase state participation in land use regulation.

The solution used in Vermont is instructive because it imposes significant state controls, yet does not supersede the local planning and zoning process. The legislation basically requires permits for certain types of development to be issued by state-appointed district commissions based upon a State-wide land use plan.

Two plans ultimately will be used. The State Land Capability Plan to be completed by July 1, 1972, will describe land use capabilities and outline planning criteria. The State Land Use Plan, which must be "based on" the capability plan divides the state into broad land use categories: forestry, recreation, agriculture, and urban. (Vermont Stats. Title 10.6043. After required review and public hearing, both plans must be submitted to the general assembly for approval by the House and Senate.)

The applicable statute does not explicitly require local plans and zoning ordinances to comply with the State Land

Use Plan. However, compliance is probably expected and may be required through judicial interpretation of the phrase ". . . the (State) plans to be further implemented at the local level by authorized land use controls such as subdivision regulations and zoning . . ." (Vermont Stats. Title 10.6043).

The permit system is administered by a State Environmental Board and nine district commissions, all appointed by the Governor. Permits are required for: subdivisions of ten or more lots or multifamily dwellings, condominiums or trailer parks with ten or more units; commercial and industrial developments over ten acres; all commercial industrial and residential developments above 2500 feet elevation regardless of acreage or size; and all commercial and industrial developments of more than one acre within a municipality where the municipality has not adopted a zoning ordinance.

Vermont adopted this legislation in 1970 in response to a statewide threat of large-scale development of vacation homes. The problem was particularly severe in the higher elevations near ski resorts. The coverage of the permit system reflects a state commitment to regulate certain developments which, if uncontrolled, could be detrimental to Vermont. The State Land Use Plan does not supersede local planning and zoning. An applicant must secure permits required by all other environmental agencies before the district commission will act upon the application.

Permit applications must contain sufficient data to enable a district commission to make findings required by the statute. The required findings go far beyond conformity to the State Plan and include conformity to the local plan,

environmental protection, and the burden on public services. (Vermont Stats. Title 10.6086.) Permits may be issued upon condition such as dedication and installation of improvements which could have been exacted by local governments.

THE COASTLINE AND PUBLIC ACCESS

The purpose of this section is to summerize the current state of the law regarding public access to, and in, the California Coastal Zone, and to indicate some key issues relating to that problem.

Public Rights to Use the Foreshore

Public rights to use the coastline for recreational purposes derive from two sources: public ownership of coastal lands or easements reserved by the state in privately owned tidelands for public trust purposes.

When California was ceded to the United States in 1848, all submerged lands and tidelands not conveyed by Spanish or Mexican grants were held by the United States subject to the public trust. When California became a state in 1850, that trust passed to the state *Pollard's Lessee v. Hagan*, 44 U.S. (3 How) 212 (1845). *LeRoy v. Dun Kerley*, 54 Cal. 452 (1880). In 1850 the United States authorized the transfer of swamplands (lands between mean high tide and mean higher high tide in the public domain to certain states including California.

In the early years of statehood, California conveyed large tracts of trust lands and swamplands into private ownership. By 1879, public concern about the rapidly dwindling tidelands was reflected in the State Constitution. Article

XV, Section 2 required owners of coastal properties to afford public access to the tidelands. The full scope of this section has never been enunciated. Thus far it has been treated as a declaration of state policy favoring public access to the tidelands. Article XV, Section 3 forbids the alienation of tidelands within two miles of an incorporated city. The tideland sales program was completely halted in 1909 by state general statute.

Until recently there has been doubt about the remaining vitality of the public trust in California. Can the state relinquish the public trust? Do present owners of tideland hold free of the public trust where the state has not expressly reserved this interest? Most of the early statutes authorizing the sale of tidelands were silent on the public trust issue. Patents issued pursuant to these statutes did not expressly reserve a public trust interest. If the trust has been terminated then the problem of public access becomes a subsidiary part of a larger concern about securing a public right to use the tidelands. If the trust has not been terminated then public access becomes the predominant issue because public rights to use the tidelands cannot be asserted unless these lands are accessible.

In *People v. California Fish Co.*, 166 Cal. 576, 138 p.79 (1913), the California Supreme Court held that the state had the power to sell the tidelands but such lands are by implication impressed with a public trust when the enabling statute and patent do not expressly reserve a public trust interest. Lower courts in recent decisions began to give a narrow interpretation of the holding in *People v. California Fish Co.*, indicating that patents issued under the earlier enabling statutes might have terminated the public trust. *Alameda Conservation Association v. City of Alameda,*

264 Cal. App. 2d 284, 70 Cal. Rptr. 264 (1968) *cert. denied* Cal. Supreme Court; *cert. denied* 394 U.S. 906, *rehearing denied* 394 U.S. 994.

In a recent case the California Supreme Court reaffirmed the full scope of the holding in *People v. California Fish Co.* In *Marks v. Whitney* (California Supreme Court, SF225669 December, 1971) the owner of a tidelands tract in Tamales Bay proposed to fill and develop the land as a marina. Whitney, the owner of adjoining upland property, claimed a private prescriptive easement for himself. He also asserted, as a member of the public, that the lands were subject to a public trust.

The enabling statute and patent under which the owner claimed title did not expressly reserve a public trust interest. The lower court ultimately found that a prescriptive easement had been created; however, the court denied that Whitney had standing as a member of the public to assert the public trust. The lower court also held that Whitney's private easement was subject to any rights which Marks might have to fill the tidelands. The Supreme Court of California reversed and remanded the case, holding that a member of the public has standing to defend the public trust. In addition, the public trust was defined in a manner that would permit a lower court finding that the land must be left in its natural state.

The cases discussed thus far refer only to patents issued under general sales statutes. Where the enabling statute was for the express purpose of harbor improvement, the court may find that the legislature intended to relinquish the public trust. *Knudson v. Kearney*, 171 Cal. 250 (1915).

The fact that lands initially subject to a public trust have been filled in or otherwise altered, will not, IPSO FACTO,

empower a court to declare that the trust is no longer operative. *Newcomb v. City of Newport Beach*, 7 Cal. 2d 393, 60 Pac. 2d 285 (1936). For such lands the court will recognize a termination of the trust only upon a legislative determination that specified tidelands are no longer useful for public trust purposes. *City of Long Beach v. Mansell*, 3 Cal. 3d 462, 482, 91 Cal. Rptr. 23, 476 Pac. 2d 432 (1970). The state must, of course, act within the scope of its duties as trustee for the public.

The public uses encompassed by the public trust have traditionally been phrased in terms of commerce, fisheries, and navigation. Many states, including California, include certain recreational uses such as fishing, hunting, bathing and boating as an incident to navigation. *Bohn v. Albertson*, 107 Cal. App. 738, 238 Pac. 2d 128 (1951). In *Marks v. Whitney*, the California Supreme Court has revitalized the public trust, recognizing that it developed, not as an arbitrary allocation of rights, but as a response to public needs:

> The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over the other . . . . . There is a growing public recognition that one of the most important public uses of the tidelands—a use encompassed within the tidelands trust—is the preservation of those lands in their natural state, so that they may serve as ecological units for scientific study, as open space, and as environments which provide food and habitat for birds and marine life, and which favorably affect the scenery and climate of the area. It is not necessary to here define precisely all of the public uses which encumber the tidelands.

It is clear that most of the coastline up to the line of mean high tide is either state owned or in private ownership subject to a public trust. It is therefore proper to shift the focus of inquiry to public rights of access to these lands.

Public Access Rights

It is clear that the public has a right to use California beaches below the high water mark for recreational purposes, either because the land is owned by the State or because the land is impressed with a public trust for commerce, navigation and fisheries. Public recreation is one of the recognized incidents of navigation in California.[1] However, the public's right to use the foreshore (the lands between mean low tide and mean high tide) cannot be asserted UNLESS THESE LANDS ARE ACCESSIBLE. Where there is no publicly owned access to the foreshore, the beach user must either obtain consent of the upland owners or trespass.

Trespass

Criminal trespass, in contrast to civil trespass, is available against persons who enter private lands without permission only in limited circumstances. Penal Code Section 602 is aimed primarily at trespassers who injure or make a severance from the realty; however, some subsections cover mere entry, including the following:

Section 602 . . . . . subsection

(g) Entry on lands where shellfish are growing.

(h) Willfully opening a gate and leaving it open without the owner's written permission.

(i) Building fires without written permission on lands where signs forbidding trespass are displayed.

(j) Entering lands with the purpose of injuring property or interfering with business.

(k) Entering enclosed, cultivated or unenclosed lands where signs forbidding trespass are displayed and thereafter discharging any firearm.

(l) Entering and occupying real property without permission.

(m) Driving any vehicle upon lands known to be not open to the general public, without permission.

(n) Refusing to leave land not open to the general public upon request by the owner and a police officer.

(o) Entering lands closed to entry as hazardous fire areas as provided in Section 4256 of the Public Resources Code.

The paucity of reported cases suggests that this Section is seldom invoked against recreational trespassers. A typical recreational user of private coastal lands would be covered. if at all, by Subsection (l) and (m). Subsection (l) has been defined not to include transient overnight use by persons camping with sleeping bags.

There can be no trespass action against a recreational user of state-owned tidelands who has gained access from a nearby public way, merely because he interferes with the private use of the nearby lands above mean high tide. Moreover, a person who trespasses upon privately owned uplands is normally not guilty of criminal trespass. In *People v. Wilkinson* 56 Cal. Rptr. 261 (1967) the accused

persons parked their car on the public highway and trespassed upon a large ranch in the Big Sur area. They camped overnight on the private beach in sleeping bags, about seventy-five feet to seventy-five yards from the mean high water line. Their conviction for criminal trespass was reversed on the grounds that their transient overnight use was not within the meaning of Penal Code Section 602 (1) covering trespass which makes criminal primarily those acts conveying an intention to acquire property rights (which has been used against squatters, "sitters-in", etc.)

The court in Wilkinson reviewed the history of Subsection (l) and found that the legislature's main purpose was to punish squatters. Subsection (m), added by the statutes of 1970, significantly expands the possibilities for criminal sanction against recreational trespassers. A comparison of Subsections (l) and (m) suggests that it might be a misdeameanor to make overnight use of a private beach in a camper. It is probable that the courts will give a strict interpretation of the requirement in Subsection (m) that the defendant have a special knowledge that the lands in question are not open to the public. The word "vehicle" as used in this provision. would not include a devise propelled exclusively by human power, such as a bicycle.

A comparison of Subsection (n) also enacted in 1970 with Subsection (k1) suggests that if the lands are not enclosed, cultivated or posted with signs forbidding trespass, refusal to depart on request of the owner alone will not give rise to a misdemeanor, but otherwise it will.

Separate provisions of the Penal Code make entry upon posted lands a misdemeanor when the lands are used or designed for certain industrial purposes. Penal Code Section 554.

Extent of Protection of Private Lands

Private owners nevertheless retain rights to protect their property. An upland owner has the right to erect a fence along the line of mean high tide for the purpose of excluding the public.

In *People v. William Kent Estate Co.* 242 Cal. app. 2d 156, 51 Cal. Rptr. 215 (1966) the owners erected a fence on the sand spit between Bolines Bay and the Ocean. The owner's right to erect the fence was sustained, so long as the fence did not encroach upon State-owned tidelands. But an upland owner cannot erect obstacles which prevent lateral movement across the tidelands. Furthermore, the owner cannot erect barriers which impede the public's right to navigate upon sloughs and waterways which penetrate his property.[2] The test for navigability in California for inland streams is whether or not the stream is navigable for recreation purposes.[3] In *Bohn v. Albertson* 107 Cal. App. 2d 738, 238 Pac. 2d 128 (1951) the same test was applied in estuarine lands. A tract originally conveyed as swamp and overflowed land (generally land between mean high tide and mean higher high tide) was flooded when a levee on the San Jaoquin River broke in 1938. From 1938 to 1947, the general public used the tract in rowboats, skiffs and pleasure boats. The court held that the new lessee could not charge admission or otherwise exclude the public until he had repaired the levee and reclaimed the land.

Common-Law Dedication

In practice, the public has continuously entered upon private lands without obtaining the owner's express consent in order to gain access to the coastline. Until recently, such recurrent use by the public was presumed to be equivalent

to a license and did not create vested property rights in the public. But in *Gion v. City of Santa Cruz. Dietz v. King,* 2 Cal. 3d 29, 84 Cal. Rptr. 162 465 P. 2d 50 (1970) the California Supreme Court held that if the public enters upon private beach areas for five continuous years, without permission and without significant objection by the owner, an easement in favor of the public for general recreational purposes was created. The Court relied upon the common-law doctrine of dedication to achieve this result. Common-law dedication is a judicially created doctrine governing voluntary transfer of land to the public. In many jurisdictions, including California, common-law dedication has been supplemented by statutory provisions. (See Cal. Business Prof. Code 11500-11641).

The classic mode of common-law dedication requires an unequivocal offer of dedication by the owner and an acceptance of the offer by the public.[4] Most early cases involved public rights to use private roads--a matter of obvious importance to a developing nation. A finding of dedication relieved the local government of the expense of purchasing an easement where the public had been using the road with the apparent consent of the owner.

Related Legislation

AB 2885 which became Chapter 1434 of the current statutes added a section to the California Community Redevelopment Law declaring as a matter of state policy a seashore is a blighted area for purposes of redevelopment when characterized by a decline in the coastal environment, including recreational and aesthetic values. OR WHEN THERE IS A NEED FOR PUBLIC BEACH AREAS

AND PUBLIC ACCESS THERETO. Cal. Health & Safety Code Sec. 33032.1 Section 2d (emphasis supplied).

Chapter 1434 amends Health and Safety Code Section 33430 relating to the property disposition authority of the redevelopment agency. The new subsection (b) adds to the general powers statement a qualification that coastline property acquired under Section 33032.1 shall be used only for public purposes. Presumably, this qualification will be given a strict interpretation as distinguished from the broader general welfare concept used to sustain other uses of condemned property.

AB 1301, just enacted, provides new criteria for the regulation of subdivisions. A new section requires the governing body of a city or county to deny approval to a final or tentative subdivision map upon making any of the specified findings. One of the grounds for denial is that the design of the subdivision will conflict with existing public easements for access through or use of the property. The subsection expressly restricts consideration to easements of record and easements established by final judgment, and also allows the governing body to approve the proposed subdivision if it finds that alternate easements are available. Cal. Bus. & Prof'ns Code Section 11549.5(g). (Subdivision Map Act).

AB 1301 does not amend or repeal the existing provisions of the Subdivision Map Act which require reasonable public access to the tidelands as a condition of approval for all proposed subdivisions located on the coastline. Section 11610.5, added by the statutes of 1970, required that if existing alternative public access were not available within a reasonable distance of the subdivision, the subdivider

must dedicate new access routes. The city or county has the responsibility for determining what constitutes reasonable public access based upon the size of the subdivision, the likelihood of trespass, the uses appropriate to the types of coastline and the mode of travel used on the access route. However, the statute does not require a subdivision to provide for public recreational use of the lands above the line of mean high tide.

In response to public need, the courts developed liberal tests for the voluntariness of the dedication. The outermost limit of voluntariness is reached in the doctrine of adverse public user. Where there is continuous use by members of the public without the express permission of the owner a conclusive presumption of dedication arises.[6] Under this doctrine, no manifest intent to dedicate need be found.

It is apparent that the doctrine of implied dedication through adverse public user bears some similarity to the creation of easements "by prescription", i.e., where a few individuals trespass for five years and create an easement for themselves. In many jurisdictions, easements by prescription may be created in favor of the public. The main advantage of this result is that the court need not rely upon the fiction of implied intent to dedicate.

However, California courts have not permitted public easements to be created by prescription.[7] The objections to the creation of a prescriptive easement in favor of the public are: 1) the general public is not an entity which can hold an easement; 2) for the statute of limitations to run, the use must be adverse in that it would afford the basis for trespass action, but a trespass action

cannot be maintained against the public at large; and 3) in order for a prescriptive easement to be created the use must be exclusive, but an easement in favor of the public cannot be created when only a small, identifiable number of persons trespass.

In the GION case the Court analyzed the following issues relating to the common-law dedication by adverse use: "(1) When is a public use deemed to be adverse? (2) Must a litigant representing the public prove that the owner did not grant a license to the public? (3) Is there any difference between dedication of shoreline property and other property?"

To satisfy the element of adversity, the claimants on behalf of the public must show that various groups of persons have used the land for more than five years as if it were public land. In the case of a beach or shoreline area, the public must have used the land as if it were a public recreation area. If only a limited and definable number of persons used the land. a personal prescriptive easement, but not a public easement, might be found.

Formerly, where the public entered upon unenclosed and unimproved land, the court raised a presumption of license which precluded a finding of adversity, unless the claimant could rebut the presumption.[8] But in GION, the question of a license becomes one of fact. "For a fee owner to negate a finding of intent to dedicate based on uninterrupted public use for more than five years . . . he must either affirmatively prove that he has granted a license to use his property or demonstrate that he has made a bona fide attempt to prevent public use." 2 Cal. 3d at 41.

After reviewing extensive authority in statutes, cases, and the Constitution encouraging public use of shoreline recreational areas, the Court held that the same rules should govern commonlaw dedication of shoreline property as apply to roads.

A desirable but not essential element to a finding of implied dedication in *Gion v. City of Santa Cruz* was the long standing maintenance and repair of the land by the City in furtherance of recreational use by the public. According to GION, an implied dedication arises at any time previous owners allow widespread public use for the prescriptive period. Even if the dedication is not formally accepted, it will be irrevocable and binding upon subsequent owners.

The GION case left several questions unanswered and its unequivocal holdings clearly were disturbing to landowners on the coastline. The uncertainties could be summarized as follows:

A. How does an owner of coastal property avoid new dedications?

At the time GION was decided, there were two statutory provisions enabling landowners to create licenses expressly giving consent to each user of the land. Under California Civil Code Section 813, he could record a notice of consent for described purposes. There is language in the section to indicate that the recordation would be binding upon the general public. Under Civil Code Section 1009, an owner could prevent prescriptive easements by posting signs.

The Court did not refer to these statutory protections, despite the obvious similarities between prescriptive easements and implied dedication. Rather, the Court stated that

minimal and ineffectual attempts to exclude the public do not qualify as bona fide. Furthermore, the efforts required to be expended depend upon the character of the land: "Although 'no trespassing' signs may be sufficient when only an occasional hiker traverses on isolated property, the same action cannot reasonably be expected to halt a continuous influx of beach users to an attractive seashore property." 2 Cal. 3d at 41.

A landowner might easily infer that, in order to prevent an implied dedication, he must exclude the public altogether. Statutory licenses, while not creating public rights, at least facilitated short-term public access.

B. How does an owner of coastal property quiet his title?

Owners of coastal properties may be uncertain about whether public easements have vested under the criteria in GION. Until an action is brought, the owner will be unable to ensure buyers that the title is not subject to a public easement. The owner is furthermore theoretically subject to successive suits based upon different prior prescriptive periods.

C. If a public easement has been created, who shall hold and maintain the easement?

In *Gion v. City of Santa Cruz*, the City was designated to hold the easement on behalf of the public; in *Dietz v. King*, no easement holder was designated. Presumably the County of Mendocino assumed the responsibility to hold and maintain the easement. Members of the public have standing to assert an implied dedication, but some counties

might not be willing to undertake maintenance responsibilities, particularly if large scale public rights were created. If the county undertakes to maintain the easement, does it also have the right to modify or terminate the easement? Would the county be liable for persons injured on the land?

The response to GION has been predictable. Although there are no reported cases, there have been several actions brought. For example, the City of Huntington Beach has filed an implied dedication action against Standard Oil of California (Civil No. 175055 Cal. Super. Ct. Orange Cty June 8, 1970). The Sierra Club filed suit May 14, 1971 to enjoin proposed development of high density apartments on the Pajaro Dunes in Santa Cruz County, alleging that the land had been dedicated to the public by years of unrestricted public use.

Legislative Responses

In the legislature, several bills were submitted which have severely limited the applicability of GION. Chapter 941 is a direct response to GION, but it limits the operation of implied dedication only in areas other than the coastline. Under the amended Civil Code Section 813, the owner may, by recording a notice, create a license both as to prescriptive easements and implied dedications. Violations of the conditions of use imposed by the recorded notice do not create adverse public use. Until the owner revokes his recorded notice, he must not prevent public access upon his land which does not violate the terms of the notice. Section 1009, added to the Civil Code, does not alter the operation of common law implied dedication within 1000 yards of the line of mean high tide, except that the owner

may prevent NEW rights from vesting by any one of three methods:

(1) Posting signs as provided in Civil Code Section 1008 or publishing an annual notice to the same effect;

(2) Recording a notice as provided in Civil Code Section 813; or

(3) Entering into a written agreement with any federal, state or local agency providing for the public use of the land.

For all other lands, the legislature has declared that no future implied dedications shall vest except where a governmental entity has improved or maintained the land for recreational use for five consecutive years without significant objection by the owner. Future dedications will require an "express written irrevocable offer" by the owner. Nothing in chapter 941 purports to revoke or provide for the abandonment of dedications which have vested prior to the effective date of the statute.[5]

FISH & WILDLIFE IN THE MARINE & COASTAL ZONE PREPARED BY DEPARTMENT OF FISH AND GAME

CALIFORNIA IN 1970 AND BEYOND

The State of California is one of the most attractive areas in North America for people to live. Population growth and immigration since World War II have created a growing labor pool, which attracted more industry, which created more work, which stimulated a further influx of people. The present population of about 20 million people is projected to 23 million by 1980, and if encouraged without restraint the growth might go far beyond that in subsequent decades.

There are many things that attract people to California, not the least of which is the pleasant environment in which to work and play. But as urbanization and crowding increase, this very attractiveness is lessened. Fishing rivers are diverted to supply water needs. Clean air becomes smoggy. Forests and lake shores are increasingly crowded with urbanites seeking recreation in the out-of-doors, but in the process spoiling recreation for each other. We have long since passed the point of the traditional frontier philosophy where growth and progress are synonymous.

In planning for the future, one point of view increasingly favored by Californians is that places and resources creating the pleasant environment should be preserved for their recreational and esthetic values, at whatever cost to future growth. People want, in fact demand, a great diversity of outdoor recreation opportunities including a drive to enjoy the beauty of the seashore; open spaces for parks and for observing and photographing the flora and

fauna; hiking paths and trails, access to land and water areas; and a place to hunt and fish. One objective of any comprehensive ocean area plan should be to accommodate the diverse but specific fish and wildlife oriented interests of Californians. After this goal has been achieved, the plan should provide criteria to resolve thorny problems of deciding how much of each kind of recreational and commercial use should be provided, taking into account demands of users and the means available to satisfy them People want amenities just as they want a secure job, a nice home with clean water in the tap, and a good road to the seashore. Thus, a comprehensive plan for development and use of ocean area resources of California should require full consideration be given to recreational facilities as well as agriculture, industry, or urban comforts and amenities.

RECREATIONAL DEMANDS

In an urbanized society, heaviest recreational demands in a quantitative sense are imposed on areas close to cities. Here millions go for a drive to nearby beaches, or to fish from a municipal pier, or to watch shorebirds in an estuary. Outdoors recreation is not something that can be relegated only to distant mountains since nearly 91% of the population lives within 50 miles of the seashore. Perhaps the most demanding exercise in managing outdoor resources is in suburban and urban environs. Fortunately, forms of recreation expected in these areas are mostly of a nonappropriative nature and hence it is within the realm of possibility to supply them. A man who will drive 100 miles to hunt ducks may enjoy watching a flock of canvasbacks along the waterfront near his home. Many others can watch the same flock without depleting it. But this is

contingent upon maintaining a waterfront environment that attracts canvasbacks or other waterfowl. The suburb surrounded by open lands is a more satisfying home environment than an identical suburb completely engulfed in sprawling urban development. Nearly all people, even the most case-hardened urbanites, seem to find enjoyment and relaxation in contact with open spaces and their natural populations of plants and animals.

Public concern with outdoor values embraces a wide spectrum of tastes and preferences. One precept of good planning is maintaining a maximum variety of choice so that an individual can elect the form of recreation he prefers. Many millions of Californians visit parks and beaches along the coast, camp and fish, and enjoy watching wildlife. Hundreds of thousands fish or skin dive offshore.

VARIETY AND QUALITY

Preservation of a substantial block of salt marsh along the shore of San Francisco Bay precludes fill and development for other alternative uses such as industry, subdivision, or even public park land. Protection of bay and ocean waters from pollution so they will have full recreational value will require more sophisticated waste treatment or alternate disposal methods. Nevertheless, special costs would be fully justified to protect the quality of the outdoor environment, whatever the impact on conventional programs of resource development.

The long-range plan for management of fish and wildlife resources in the coastal zone of California should include specific recommendations based upon sound information for meeting recreational demands through 1980 and beyond. It is essential to provide for continuous support of a substantial scientific and statistical service to supply, in adequate depth and timely fashion, data required to make rational management decisions on an objective basis.

A coastal area plan should offer Californians an optimum future environment for meeting recreational needs and commercial opportunities. Economic growth and development not always should be permitted precedence over the amenities of life. Ecological and environmental as well as fish and wildlife considerations must become as important as the economic factors. Recreation planning should not be subservient to economic planning, but must be a part of it.

CALIFORNIA COASTLINE PRESERVATION AND RECREATION PLAN

August 1971

State Of California The Resources Agency

DEPARTMENT OF PARKS AND RECREATION
P.O. Box 2390 Sacramento 95811

It is evident that there are more people and consequently more demands being placed on the coast's resources than the shoreline can possibly support. The resulting problems can be categorized as follows:

1. INSUFFICIENT RECREATION OPPORTUNITIES

Last year, hundreds of thousands of people were turned away from state campgrounds along the coastline because there were not enough facilities to go around. And on many segments of the coast there is insufficient public recreation land available to develop more campgrounds, picnic areas, or parking lots.

2. PUBLIC ACCESS, VISUAL AND PHYSICAL

Structures are being developed at the ocean's edge at the expense of both visual and physical access. Views of the ocean along whole segments of the coast are now obliterated by residences, industrial developments, parking lots, campgrounds, commercial establishments, and billboards. Hundreds of miles of the publicly-owned tidelands have been walled off from

people by freeways, private clubs, residential and industrial developments, and military ownership. All of these uses severely restrict the shoreline visitor's access to, and use of, the state-owned sovereign lands.

3. POLLUTION

Trash, sewage, and industrial and agricultural wastes dumped into the ocean in many cases result in an imbalance of a delicate ecosystem, and may threaten human life or the extinction of plan and animal species.

A portion of the coast around Monterey Bay was posted as "unsafe for human use" during 1970 as a result of unsatisfactory sewage treatment; oil spills at sea have left some southern California beaches unusable; and the brown pelican may be threatened with extinction due to the side effects of pesticide residues.

PROVIDING RECREATION OPPORTUNITIES

All levels of government must share the responsibility for making the coastline available to public recreation.

LOCAL AND REGIONAL BEACHES

Most recreation takes place close to home and usually within one's own neighborhood, community, and metropolitan region. In coastal communities and metropolitan areas, the ocean beaches serve the same purposes as lakes, rivers, and large swimming pools within or adjacent to inland urban areas. Well over 85% of the day-users at beaches live in the immediate metropolitan area. Furthermore, coastal resort communities benefit economically

from the tourist trade attracted to their beaches. *Therefore, in urban and urbanizing areas, acquiring and managing public beaches is largely a regional responsibility.* It must be emphasized that the ocean shoreline recreation resources of a metropolitan region are the responsibility of the entire region, not just the municipalities and counties in which the resources are located. *All of the people of a metropolitan area should share in the cost of acquiring, developing, and maintaining the ocean beaches from which they benefit on a regular basis. The state should assist in the formation of metropolitan regional shoreline park districts. Coastal cities and counties could then transfer their beaches to metropolitan beach authorities for operation and development. It is also appropriate to transfer management of certain state-owned areas which receive primarily local or regional use to metropolitan beach authorities.* The tax bases of most coastal metropolitan areas are sufficiently large to support good regional shoreline park and recreation programs with only a modest tax rate.

Access to Public Tidelands

Local planning authorities should assure that new subdivisions in urbanizing areas do not block access to publicly-owned tidelands. State law now requires that reasonable access be provided by real estate developers. *In the cases of some residential areas developed prior to the enactment of the present shoreline access law it may be necessary to purchase public easements to the shoreline.* Reasonable access includes adequate parking and sanitary facilities in addition to physical access.

The 1970 *Gion vs Santa Cruz* and *Dietz vs King* California Supreme Court decisions state that the public cannot be

denied access to the shoreline over routes across privately-owned lands that it has historically used. *The district attorneys of the coastal counties must diligently defend the public interest whenever such access is denied. The State Attorney General should render whatever support is needed to the district attorneys, and take the leadership where a district attorney is unable or unwilling to act.*

Construction of New Beaches

By widening some southern California beaches, new facilities can be constructed to meet the ever increasing demand beyond the year 1980.

The Corps of Engineers should continue to study the feasibility of providing perched beaches[1] *as an alternative to rock groins for shore protection and to accommodate recreation facilities along the shore's edge.*

---

[1] Underwater rock retaining wall holding and protecting sandy beaches.

VENTURA COUNTY BEACHES STUDY

June 1976

State of California — The Resources Agency
DEPARTMENT OF PARKS AND RECREATION
P.O. Box 2390 Sacramento 95811

GENERAL DESCRIPTION

North Coast

The north coastal area consists of narrow marine terraces that lie along the border of Rincon Mountain (Santa Ynez Range). It functions chiefly as a transportation corridor between Los Angeles and Santa Barbara with Highway 101 and the Southern Pacific Railroad following the shoreline at the base of the mountains. There are several large oil separation plants located beside the highway, serving both onshore and offshore oil production installations.

Several outstanding surfing beaches are located within this area and have attracted the development of a number of small communities (Rincon Point, La Conchita, Mussel Shoals, Seacliff, Faria, and Solimar).

The greatest problems in the north coastal section arise from increased pressure for development of residential units, inadequate access and recreation support facilities, and the loss of sand from some beaches due to highway construction and natural erosion.

Central Coast

The central coast, encompassing the shore area between the Ventura River in the north and Calleguas Creek in the south, is characterized by comparatively broad,

sandy beaches, low dunes, and several lagoons. The northern three-fourths is largely urbanized, containing the cities of Ventura, Oxnard, and Port Hueneme. The inland portion of the central coast contains broad floodplains, prime agricultural land, providing one of the major economic bases of the county. The oil fields and refineries and the military installations (Port Hueneme and the Pacific Missile Range) are the other two large contributors to the economy.

SECTION 3

SEACLIFF — PITAS POINT AREA

This section of the Ventura Coast, between the small leasehold residential tract known as Seacliff and the northwestern boundary of the Emma Wood State Beach, about four miles downcoast, is not highly developed. Between Seacliff and Pitas Point, a blunt projection about three miles downcoast, there are two open space areas which are currently used for flower production. This results in an exceptionally scenic drive for the freeway traveler with unobstructed views of the ocean.

There are two county parks in this segment, Hobson Park on the downcoast side of Seacliff, and Faria Park, located adjacent to a small residential tract known as Faria Beach and the Southern Pacific Railroad at Pitas Point.

The State Department of Transportation's Pacific Coast Bicycle/Hiking Route follows the Old Coast Highway which parallels the railroad along this portion of the coastline.

Problem One: Need to Preserve Existing Open Space Lands

The residential development potential threatens the open space lands lying between Seacliff and Faria Beach and also between the freeway and the mountains east of Faria Beach.

Recommendation:

In order to preserve the scenic qualities of this section of coastline, the State Department of Parks and Recreation strongly supports the Ventura County Board of Supervisors in their approval of the County Coastal Plan in which it is stated that the present agricultural use of these lands should be maintained.

Problem Two: Need to Control Beach Erosion and Limit Beach Use

Beach erosion along the communities of Seacliff and Faria Beach and at Hobson and Faria county parks is critical and is currently being studied by the U.S. Corps of Engineers in a countywide coastal erosion control study. On several occasions, winter storms and heavy wave action have necessitated the closure of Hobson Park. Erosion of these two parks by overuse is also a factor.

Recommendations:

It is recommended that the State Department of Parks and Recreation relocate the existing 45 campsites at Hobson County Park to the proposed enlarged Faria County Park and replace them with 25 picnic units. If repair and corrective action are possible without disturbing other conditions (see Section 2, Problem (4) A, p. 50), the Department should proceed with such rehabilitation in cooperation with the county and the U.S. Corps of Engineers.

The Department should also acquire a 3.0-acre parcel adjacent to Hobson Park to enlarge this facility.

Problem Three: Need to Develop Land Freed by Railroad Realignment

The Southern Pacific Railroad has indicated to the State Department of Transportation its desire to relocate approximately three-fourths of a mile of track at Pitas Point to an alignment slightly inland to accommodate a a wider radius of turn. This change would free approximately 39.7 acres of undeveloped land contiguous with Faria County Park and permit its expansion. This acreage would allow the development of additional campsites and other recreation facilities which are needed here.

Recommendations:

It is recommended that when the railroad realignment takes place, the State Department of Parks and Recreation acquire the 39.7 acres thus freed and extend the boundaries and facilities of Faria County Park by constructing 45 new campsites, 75 picnic units, a 200-car parking lot, a new beach concession, and an administration building. It is also recommended that, since the clientele of these small county parks is largely derived from a statewide range, the State Department of Parks and Recreation take the responsibility of operating them instead of the county.

The relocation of the railroad would also permit the development of a recreation train stop in this area and it is recommended that serious consideration be given to this possibility by the State Department of Transportation, Ventura County Board of Supervisors and the Southern Pacific Railroad.

Problem Four: Rincon Parkway Should Be Developed

There should be a continuation of the Rincon Parkway development from the Old Coast Highway as was proposed in Section 2, Problem (3), p. 48 and 49.

Recommendation:

It is recommended that the State Department of Parks and Recreation extend its development of the Old Coast Highway into a parkway as proposed in Section 2, page 49. In addition to the basic plan, when the railroad is realigned, the Old Coast Highway should be relocated to a position adjacent to the railroad's new alignment.

Problem Five: Need for an Interchange at Pitas Point

There is an interchange at Seacliff and another one 7⅓ miles downcast at West Main Street in the city of Ventura. This means that southbound travelers whose destination is Faria Beach (or Solimar) must leave the freeway at Seacliff and travel 2⅓ (or 4⅓) miles on the Old Coast Highway. If an interchange were constructed at Pitas Point (with a connection to the proposed Rincon Parkway), the residents of both Faria Beach and Solimar would benefit and the amount of through traffic on the parkway would be decreased.

Recommendation:

It is recommended that the State Department of Transportation construct a full interchange at Pitas Point with a railroad overcrossing and a connection to the Old Coast Highway.

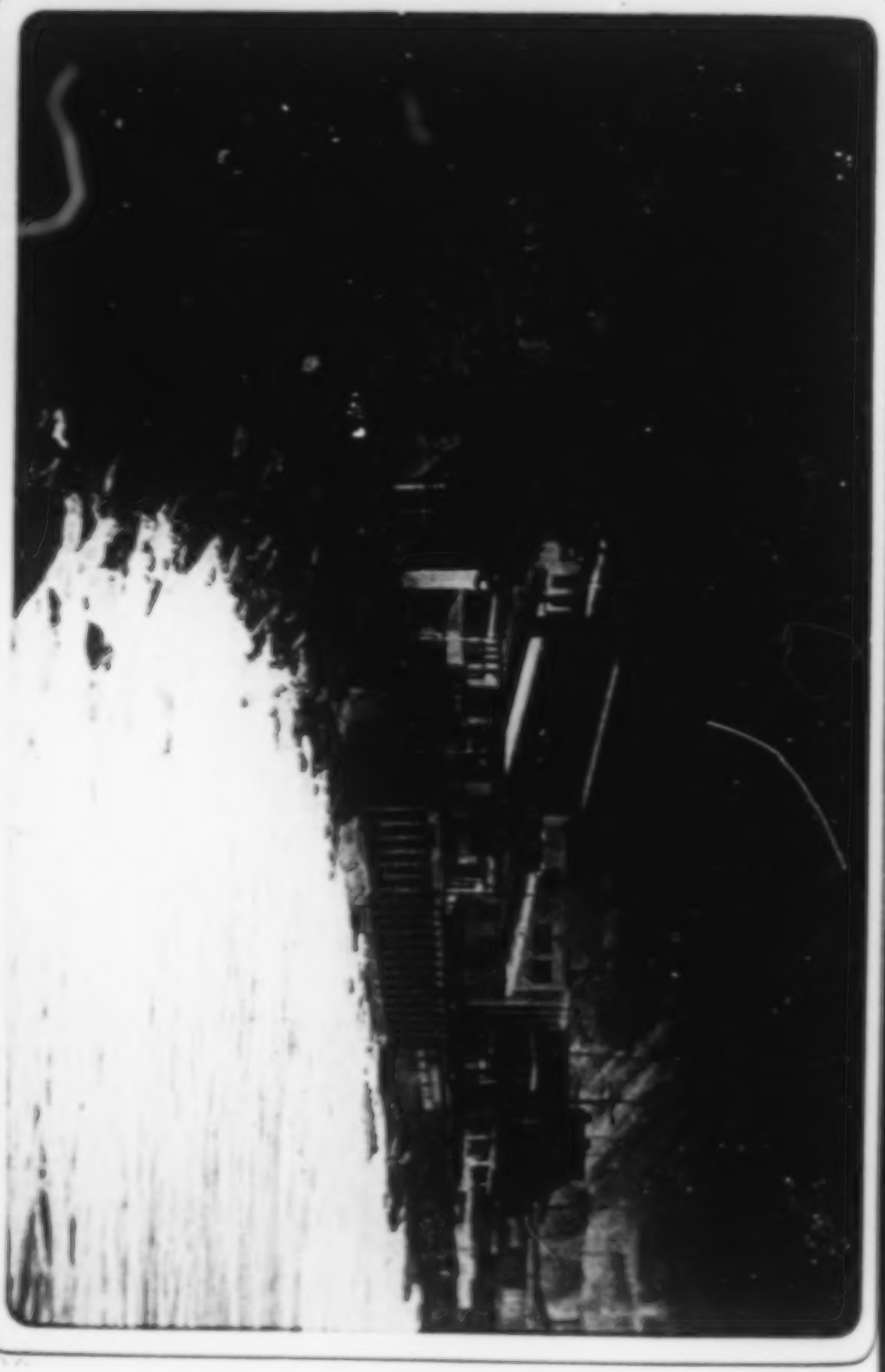
Problem Six: Need to Preserve Ocean Views between Faria and Solimar

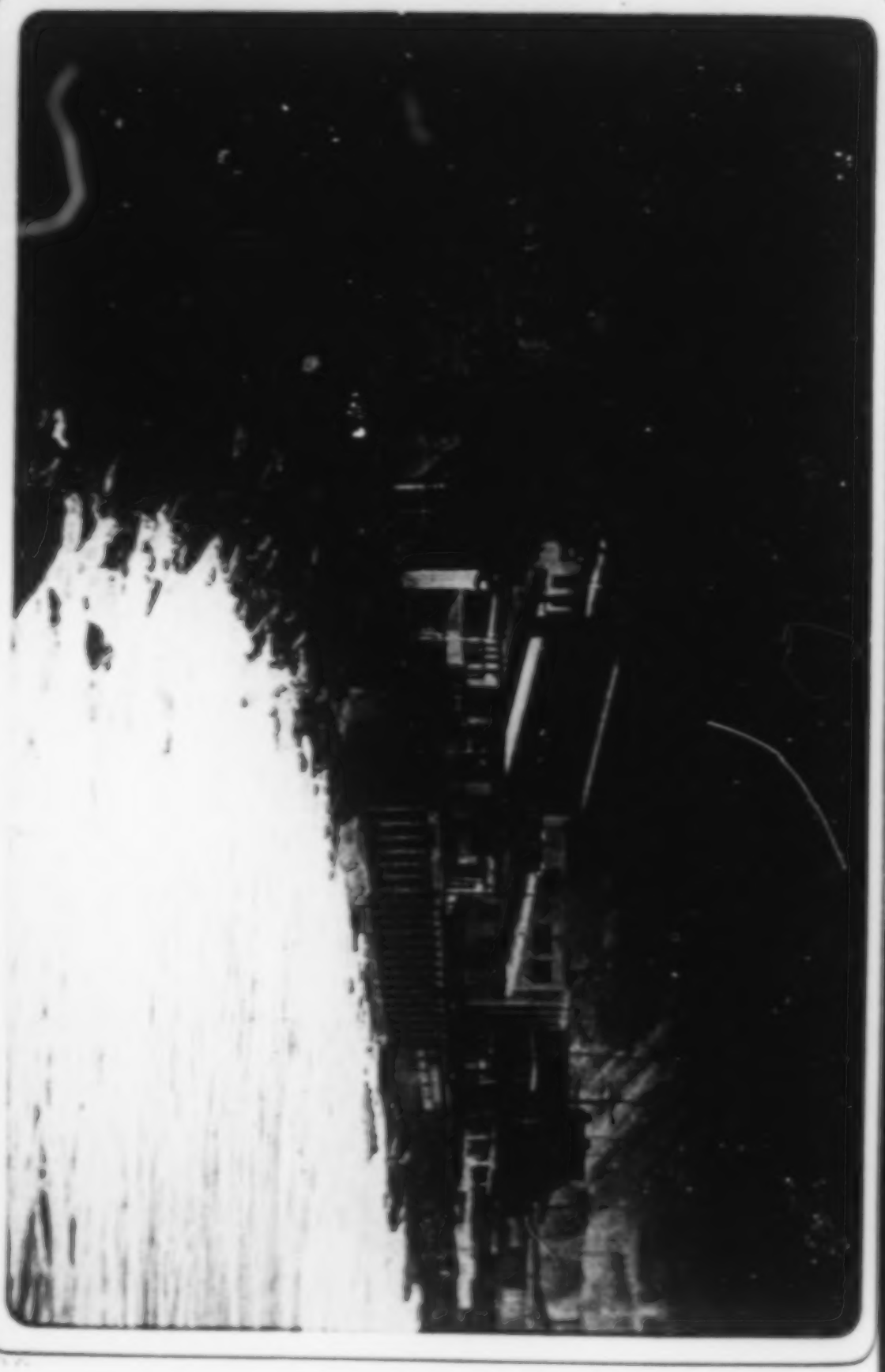
There are only two or three short breaks in the wall of structures built along the oceanfront between the upcoast end of the community of Faria Beach and the downcoast end of the Solimar Beach community (about 2½ miles).

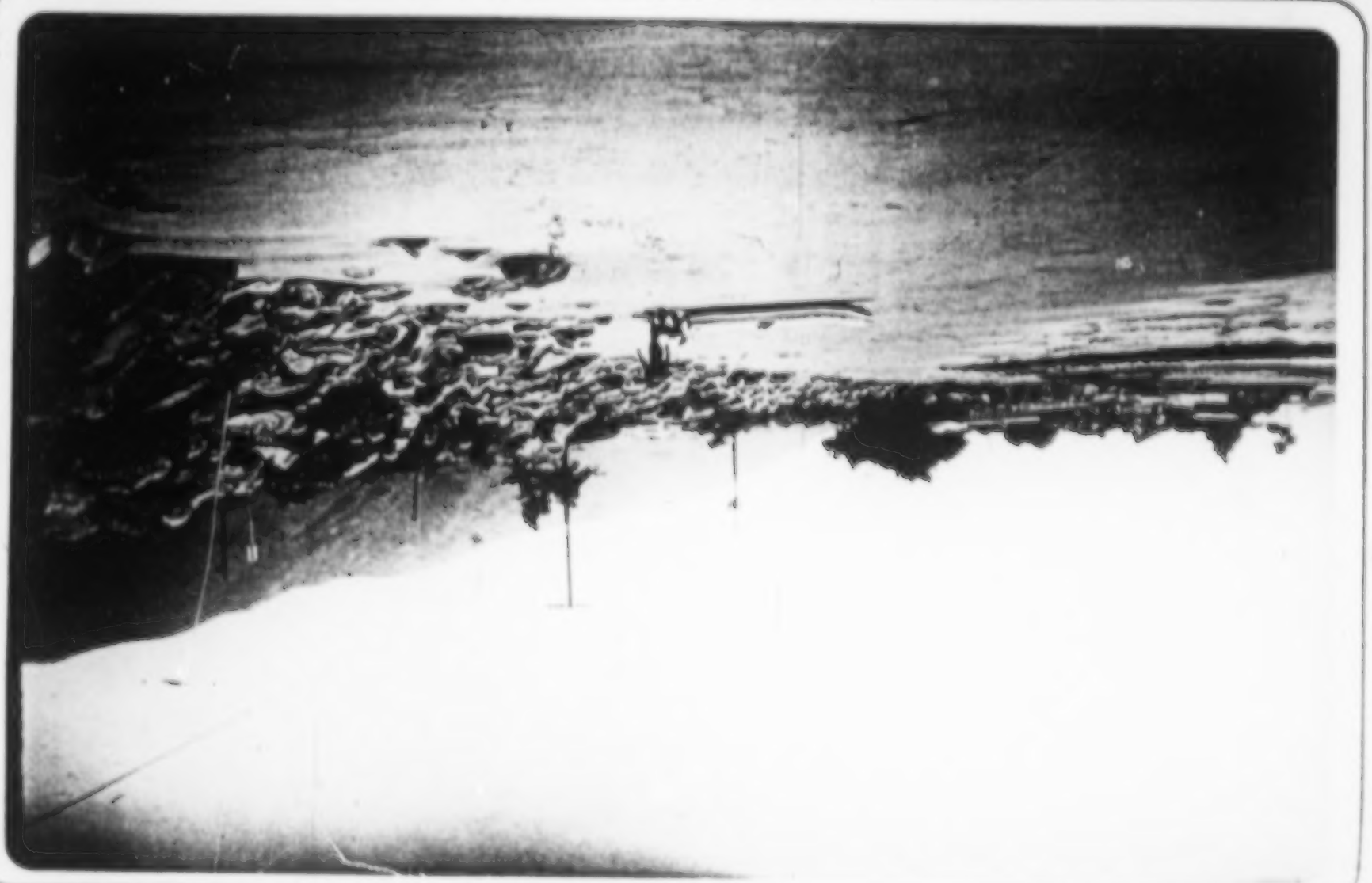
Recommendation:

It is recommended that the County of Ventura take steps to prevent any further development which would encroach upon the already limited ocean views between the upcoast end of Faria and the downcoast end of Solimar.

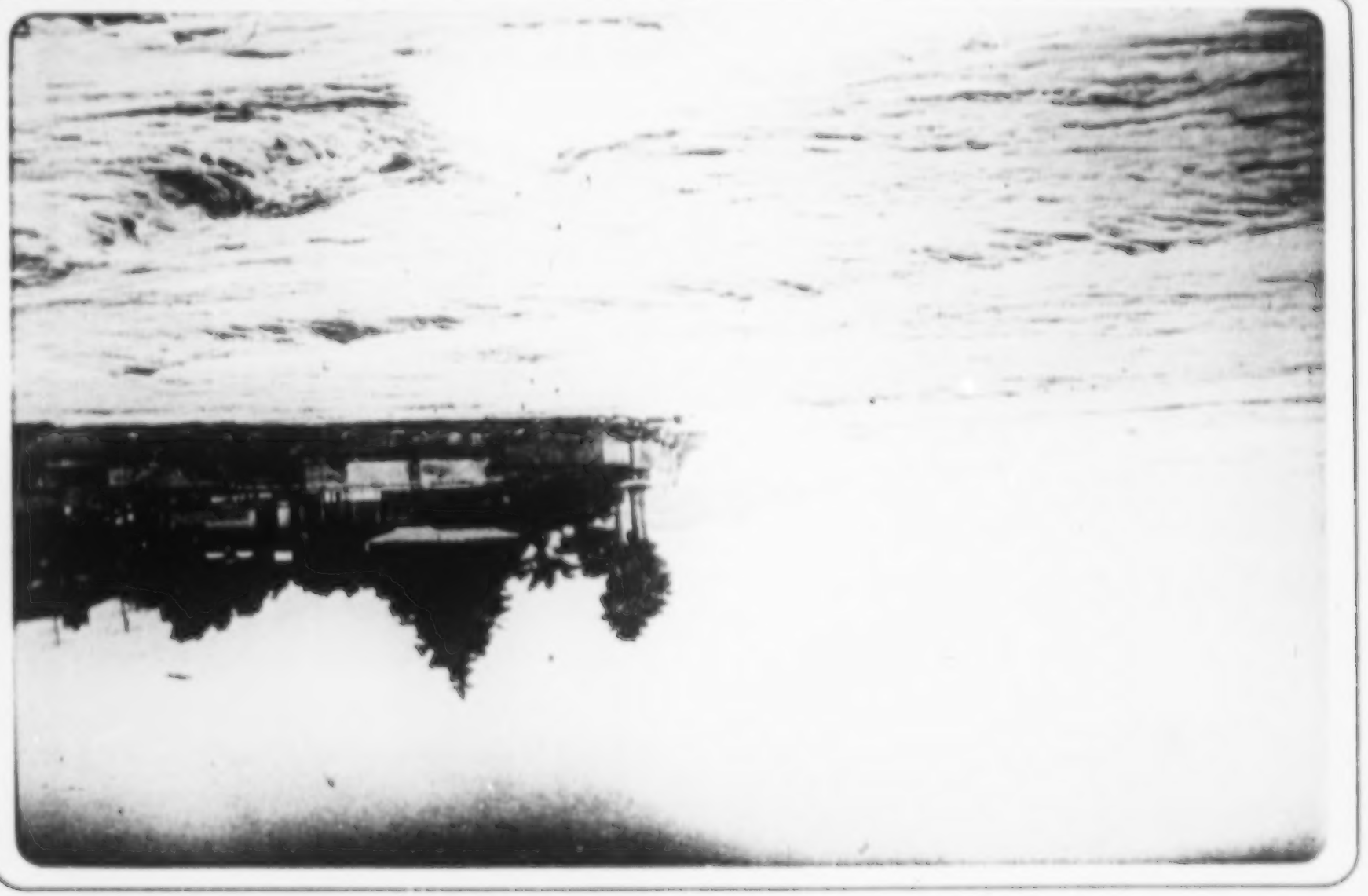
SIXTEEN SLIDES OF FARIA BEACH TRACT



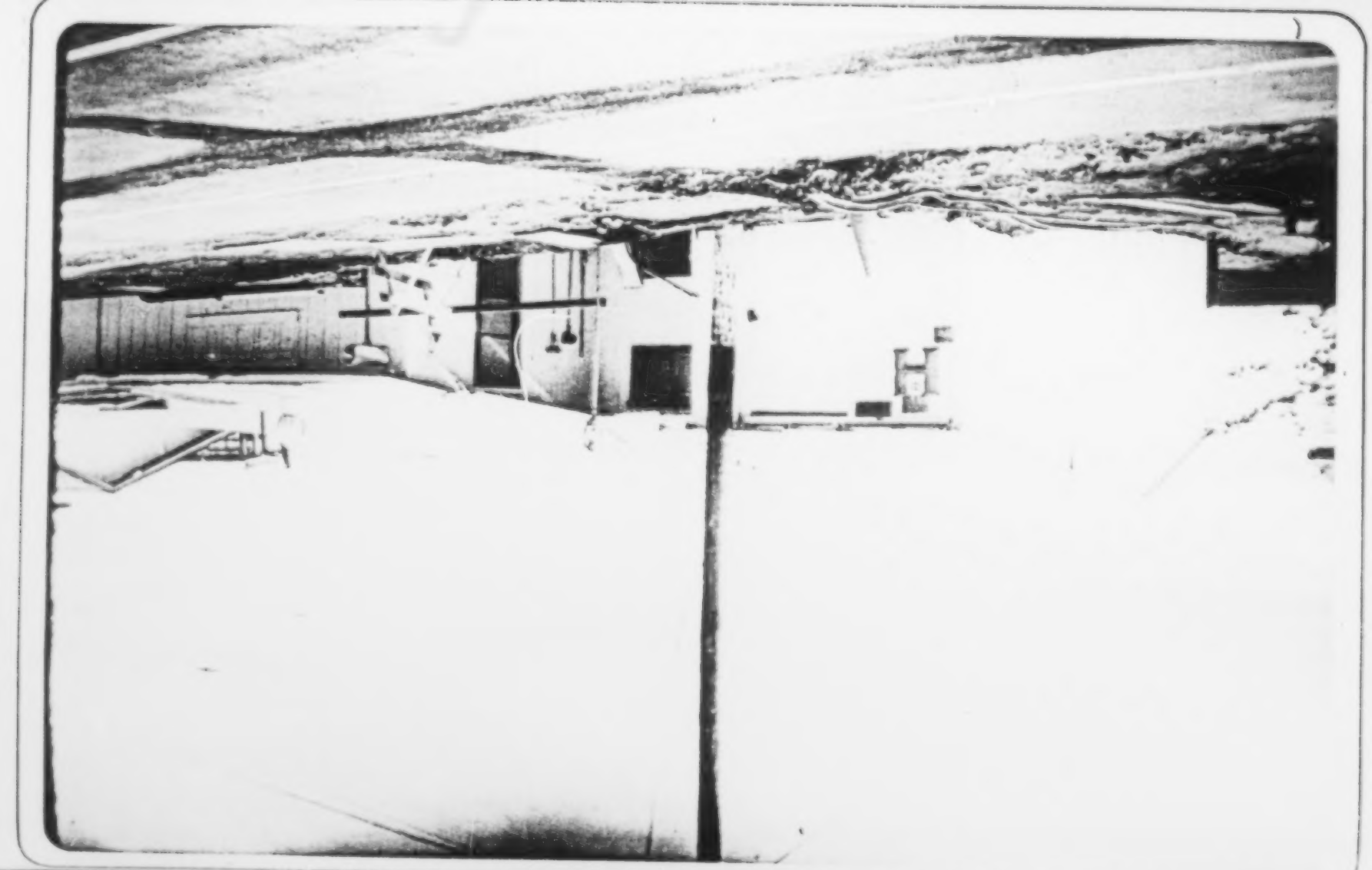




263

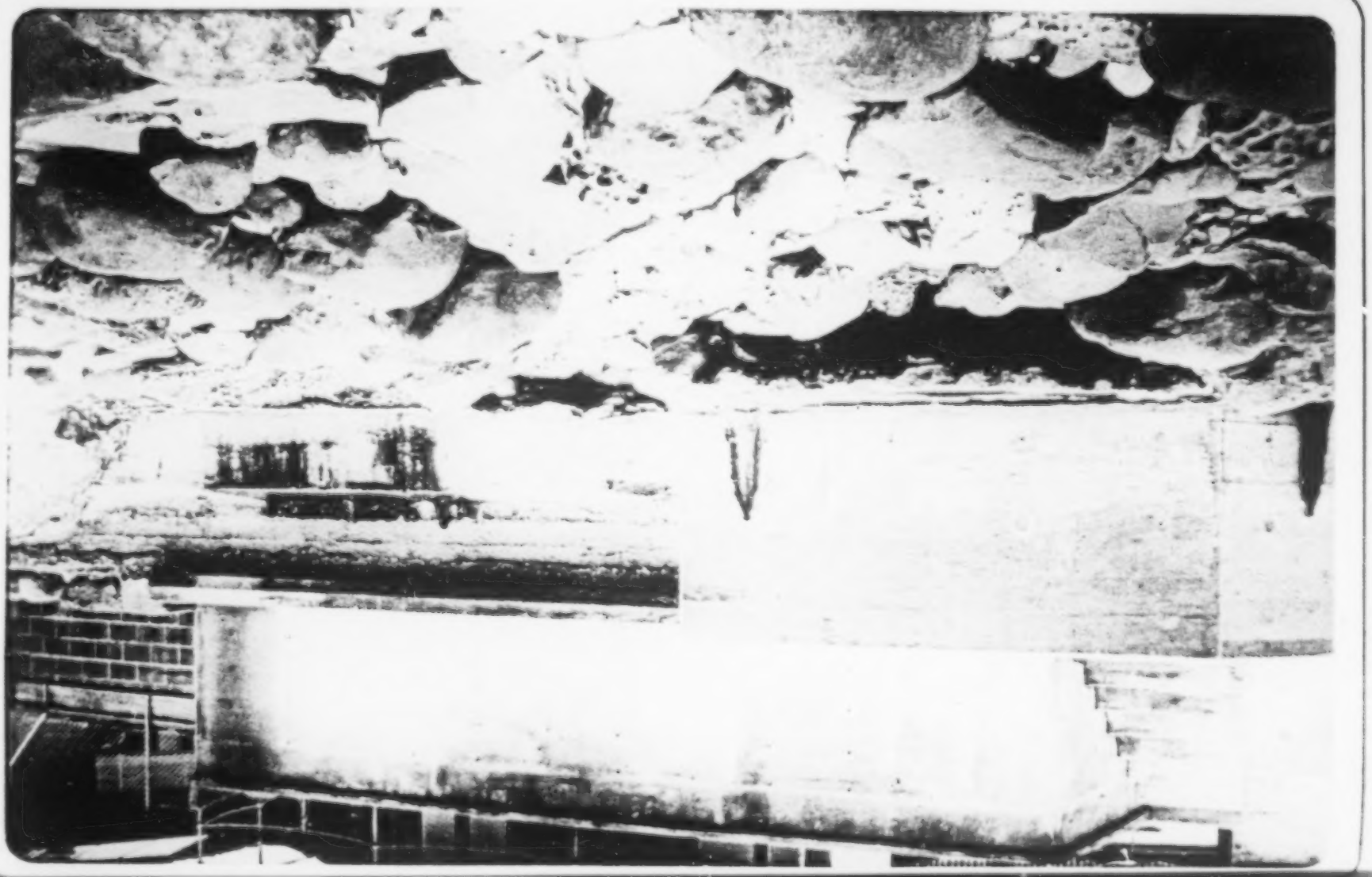


264

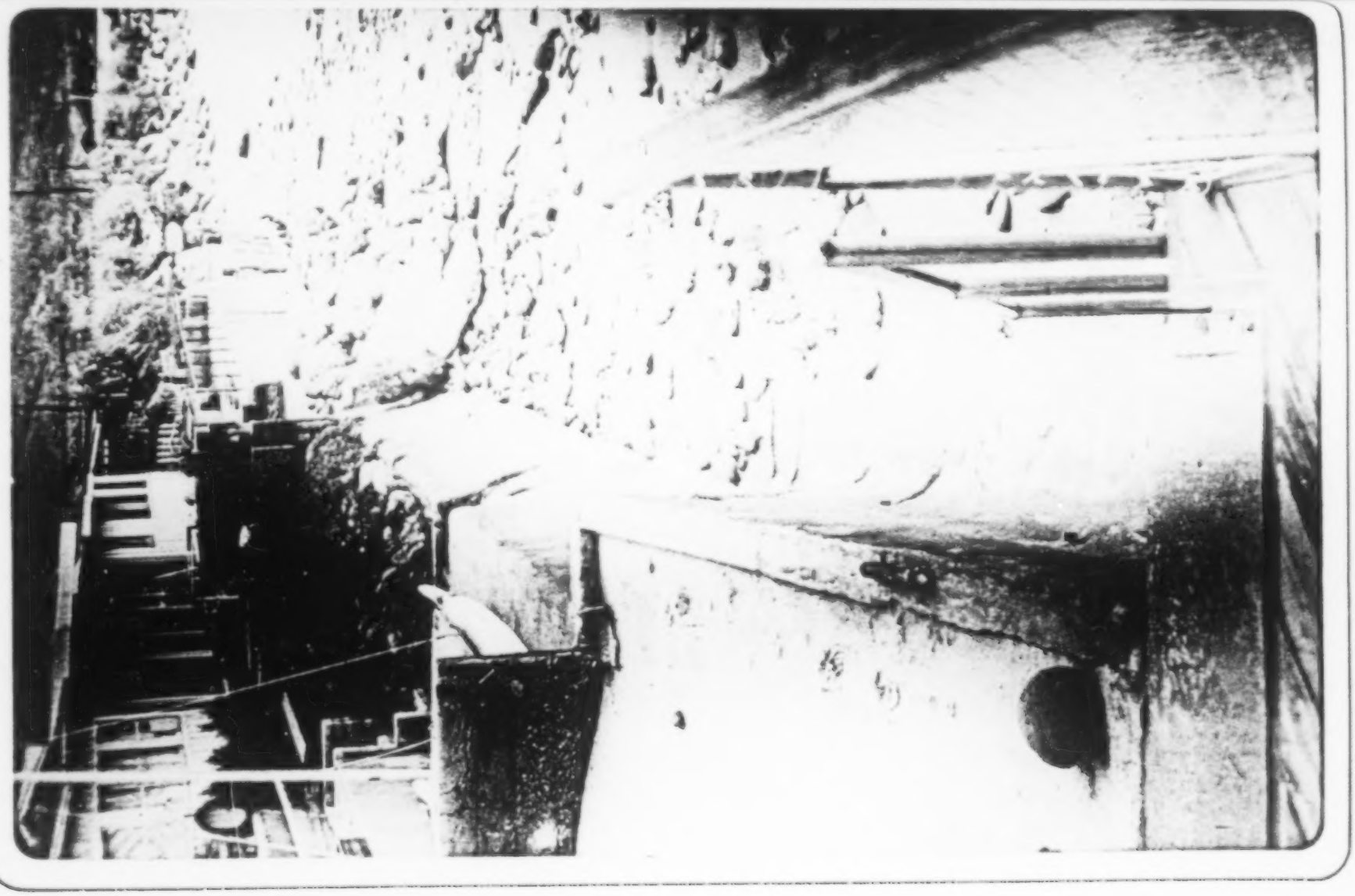


267

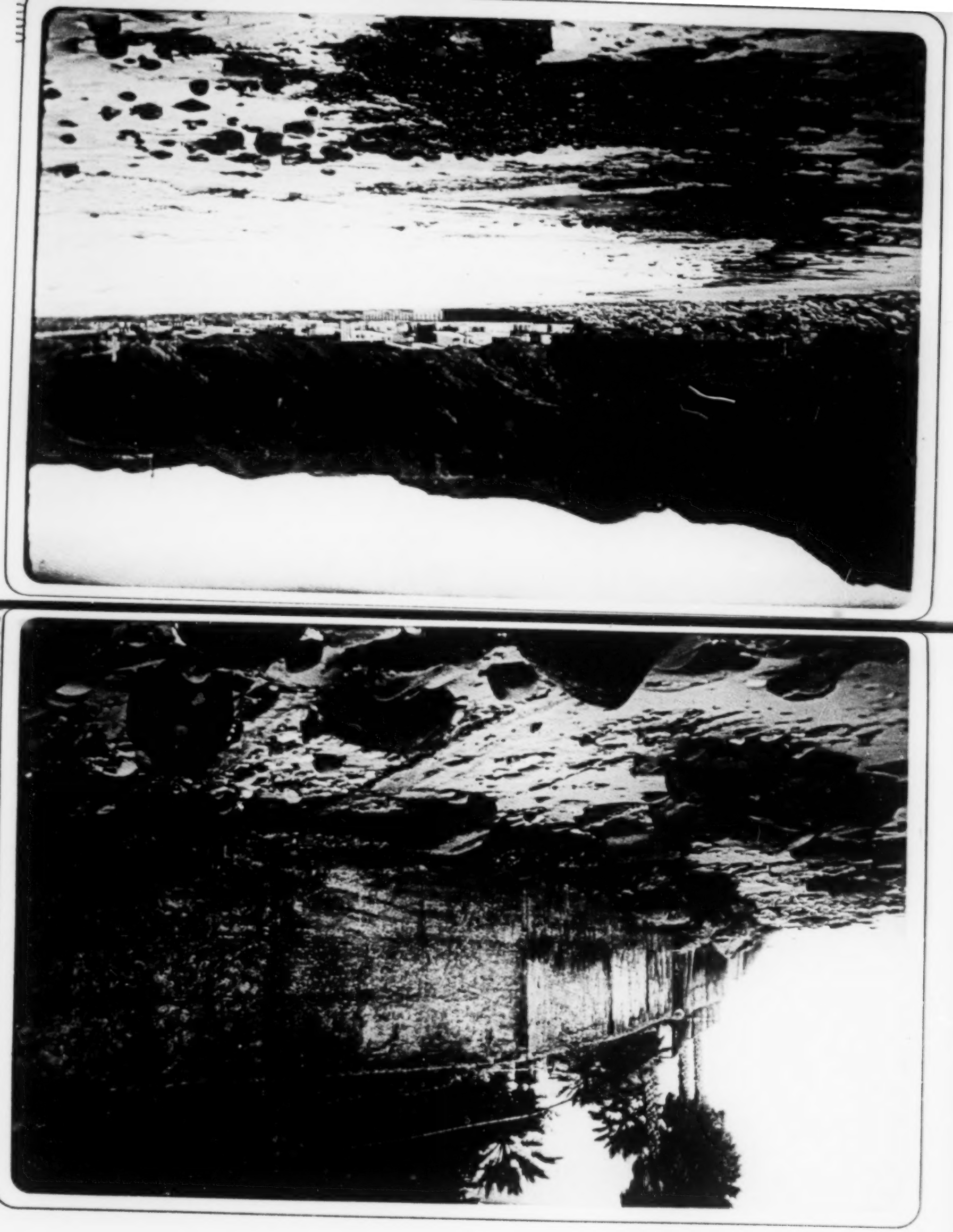
266



269

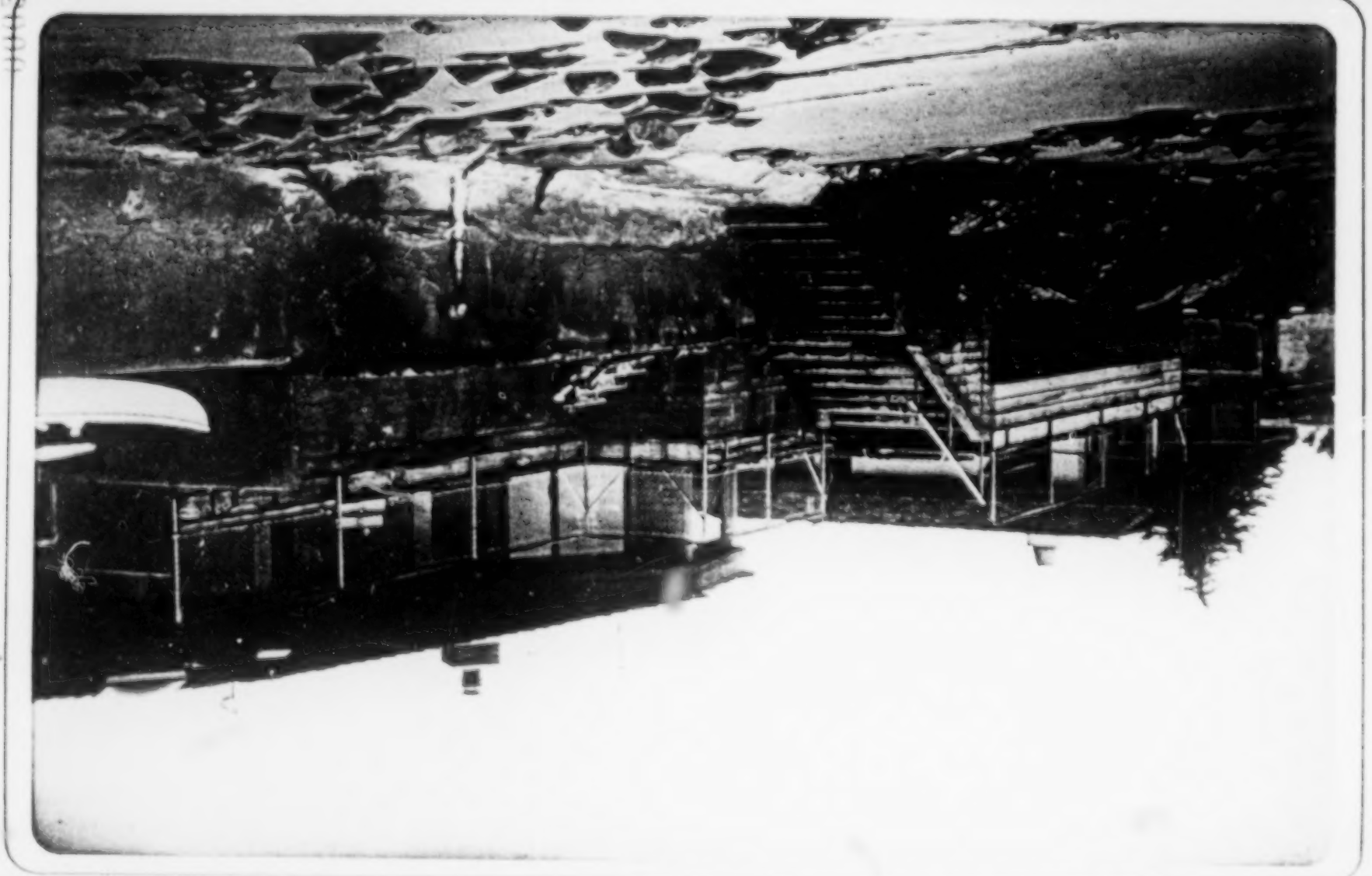


268



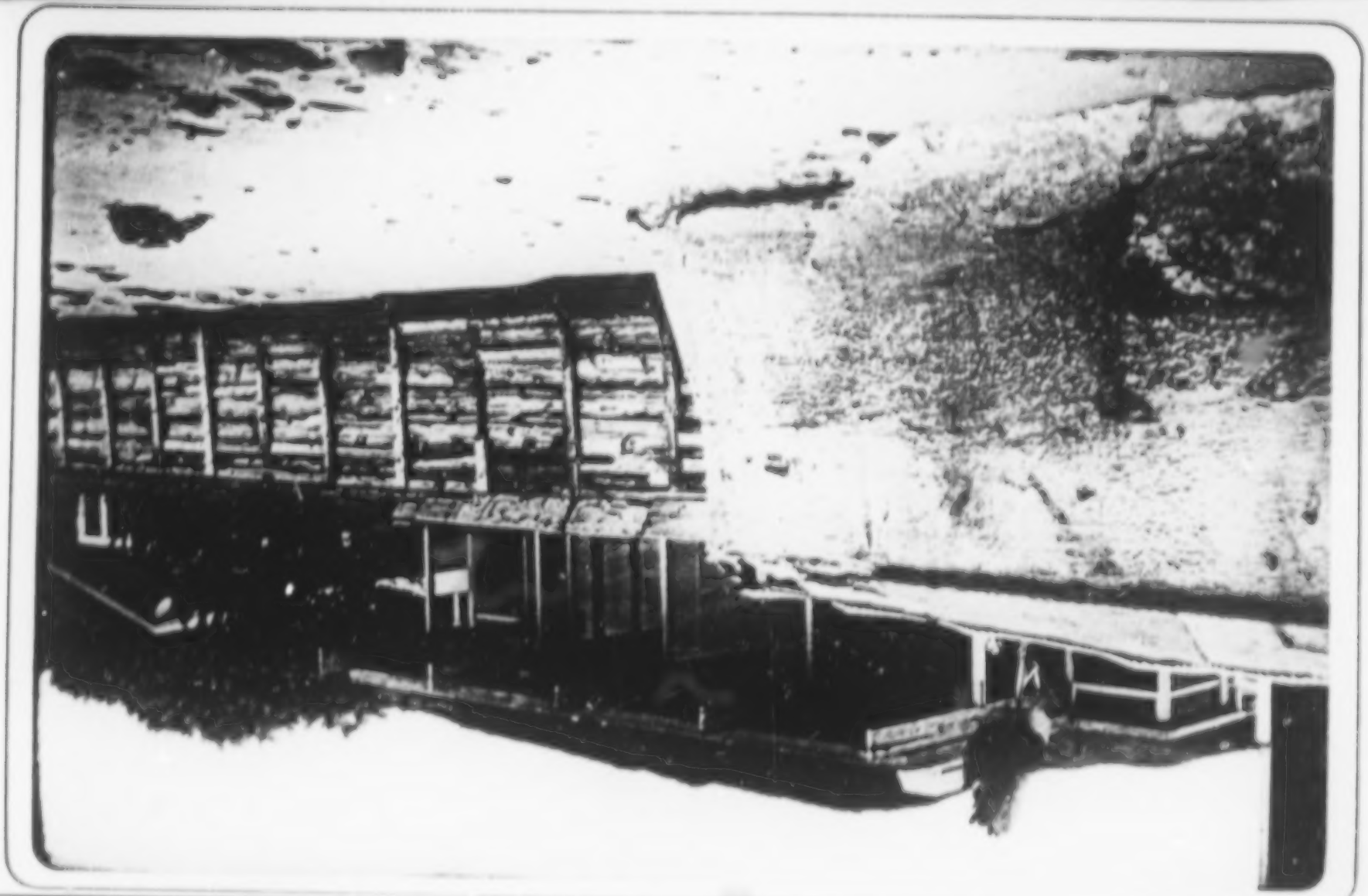
271

270

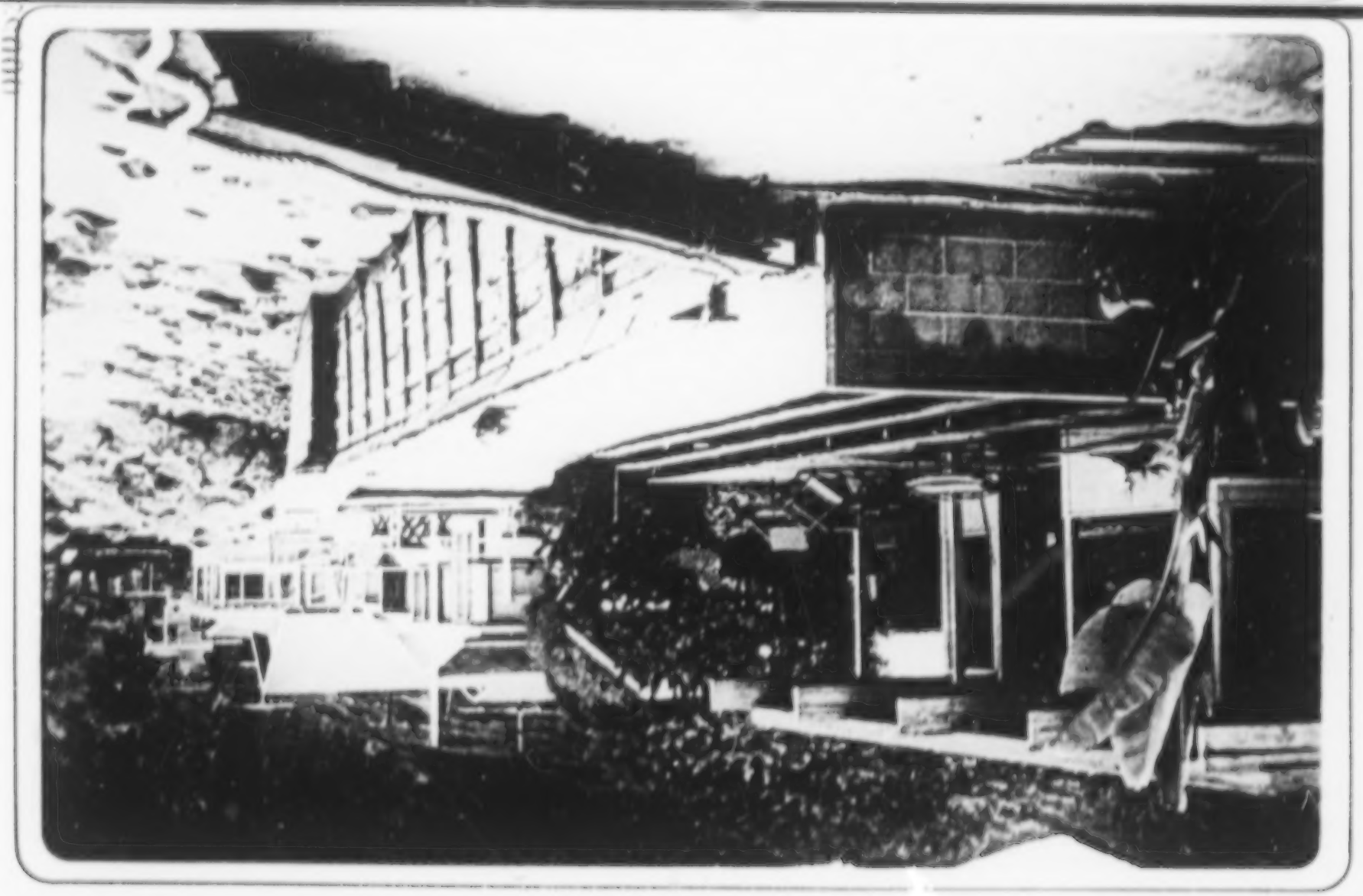


273

272



275



274

1

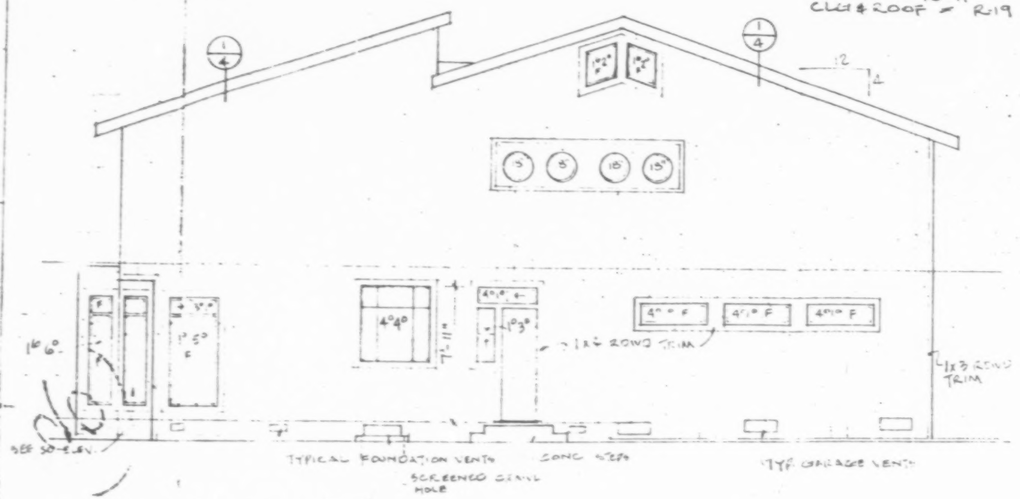
000086

ENERGY CONSERVATION:

GROSS FLR AREA =	1993 S.F.
ALLOWABLE GLASS = 1993 x .16 =	319 S.F.
ACTUAL GLASS =	525 S.F.
OVERAGE =	206 S.F.

206 x 2.2 = 453. USE 45% OF DUAL GLAZING

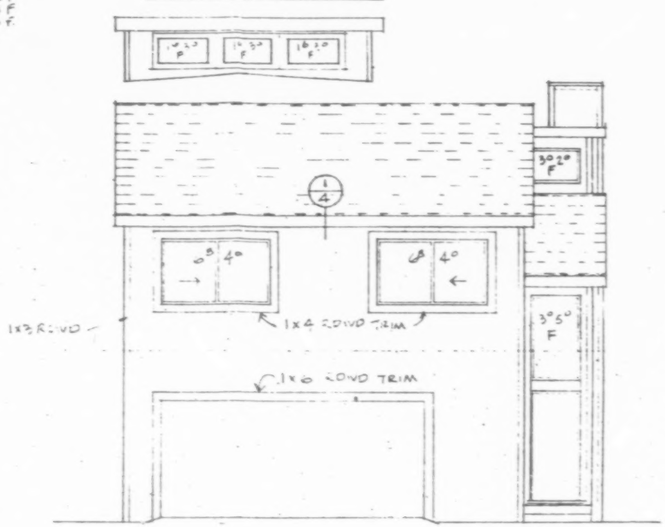
INSULATION:
WALLS = R-11
CLG & ROOF = R19



TOTAL GRADE ELEV. = 351.5 S.F.

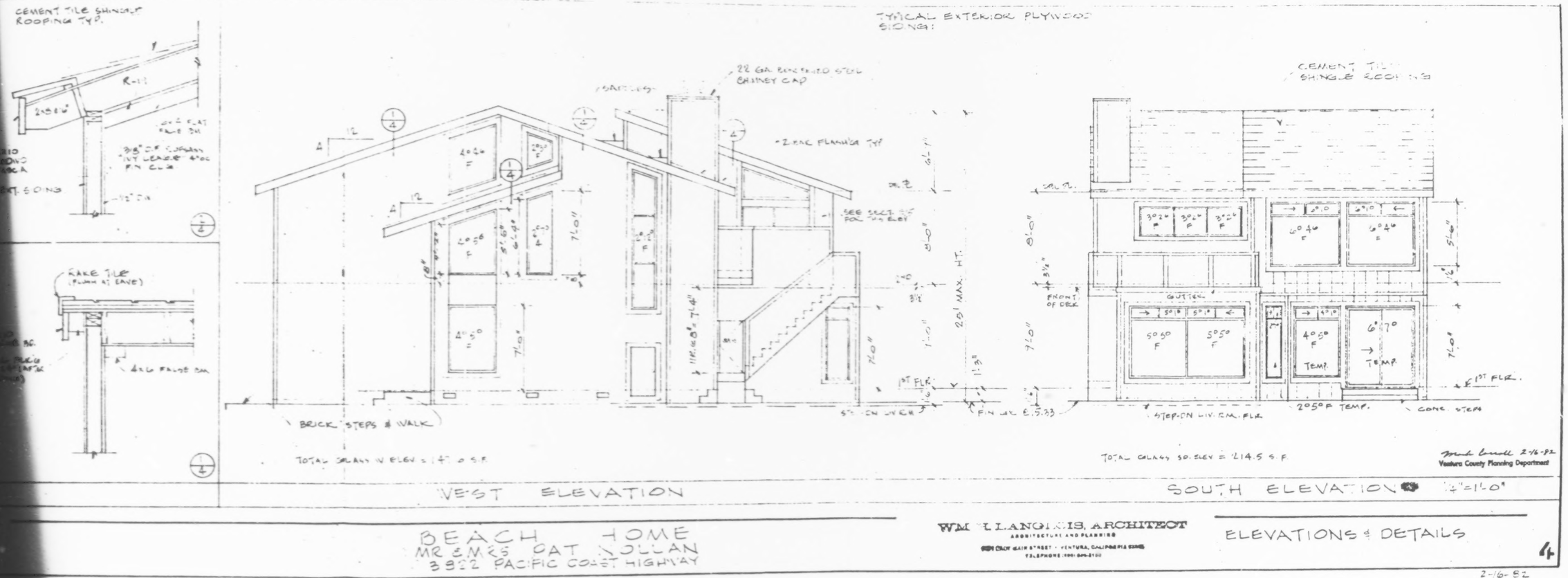
EAST ELEVATION

ELEVATION OF 'CLERESTORY'



TOTAL GRADE NO. ELEV. = 850 S.F.

NORTH ELEVATION 1/4" = 1'-0"



WEST ELEVATION

SOUTH ELEVATION 1/4"=1'-0"

BEACH HOME
MR & MRS OAT NOLLAN
3922 PACIFIC COAST HIGHWAY

WM. LANGNESS, ARCHITECT
ARCHITECTURE AND PLANNING
1024 CHAPALA STREET · VENTURA, CALIFORNIA 93001
TELEPHONE (805) 648-2121

ELEVATIONS & DETAILS

4

2-16-92

JOINT APPENDIX

VOL. II

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

JOINT APPENDIX
VOLUME II

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

JOHN K. VAN DE KAMP
Attorney General
ANDREA SHERIDAN ORDIN
Chief Assistant
Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
*JAMEE JORDAN PATTERSON
*COUNSEL OF RECORD
Deputy Attorney General
110 West A Street, Suite 700
San Diego, CA 92101
Telephone: (619) 237-6050

Attorneys for Appellee

Appeal Docketed July 29, 1986
Probable Jurisdiction Noted October 20, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

Page

Volume I

Chronological List of Relevant Docket Entries 1

Application for coastal development permit (First Administrative Record (AR 1) at 3-11) 3

Nollans' objection to special conditions (AR 1 at 57-68) 14

Plot plan and exterior elevations (AR 1 at 84, 86) 24

Transcript of April 7, 1982, commission hearing (AR 1 at 88-91) 27

Administrative Permit No. 4-82-90 (AR 1 at 41-44) 31

Judge Peck's statement of decision and first judgment (Clerk's Transcript (CT) at 233-38) 36

Coastal Commission staff report on Application No. 4-82-90 dated June 23, 1983 (Second Administrative Record (AR 2) at 128-81) 41

Excerpt from Surfing California by Allan B. Wright, Jr. (1973) (AR 2 at 28-29) 81

Excerpt from Surfing Guide to Southern California, by David H. Stern (1977) (AR 2 at 30-31) 82

Letter to Mel Nutter, Chairman, California Coastal Commission, dated May 26, 1983, from Michael David Cox, Environmental Defense Center (AR 2 at 76) 83

Memorandum to Cindy Long from Lewis Allen, Senior Lands Agent, Office of the Attorney General, dated May 25, 1983 85

Excerpt from Coastal Zone '80: The San Diego Regional Coastal Access Study, by Dennis Prescott, Vol. II (AR 2 at 301-13) 87

Excerpt from Coastal Zone '80: Beach Access Problems, Programs and Progress, by David Brower, Vol. II (AR 2 at 314-27) 121

TABLE OF CONTENTS—Continued

Page

Excerpt from Coastal Recreation: A Handbook for Planners and Managers, by Robert B. Ditton and Mark Stephens (January, 1976) (AR 2 at 336-48) 161

Excerpt from the Cumulative Impacts of Shorezone Development at Lake Tahoe, by Phillips, Brandt, Reddick, McDonald, and Grefe (February, 1978) (AR 2 at 349-71) 174

Excerpt from Coastal Zone Management Journal—Environmental Resources and Law, Marc J. Hershman (1979) (AR 2 at 372-80) 201

Excerpt from Recreational Access to the Coastal Zone, Sea Grant Advisory Program (AR 2 at 381-84) 213

Excerpt from Comprehensive Ocean Area Plan: California Department of Ocean and Navigation Development and Supplement (1971) (AR 2 at 385-95) 221

Excerpt from Fish & Wildlife in the Marine and Coastal Zone, California Department of Fish and Game (1971) (AR 2 at 396-99) 247

Excerpt from California Coastline: Preservation and Recreation Plan, Department of Parks and Recreation (1971) (AR 2 at 400-11) 251

Excerpt from Ventura County Beaches Study, California Department of Parks & Recreation (June, 1976) (AR 2 at 406-11) 255

Sixteen slides of Faria Beach Tract (AR 2 at 510-25) 261

Volume II

Transcript of April 28, 1983, hearing before the California Coastal Commission (AR 2 at 530-49) 277

TABLE OF CONTENTS—Continued

Page

Transcript of May 26, 1983, hearing before the California Coastal Commission (AR 2 at 550-83) 292

Transcript of June 23, 1983, hearing before the California Coastal Commission (AR 2 at 584-87) 325

Supplemental petition for writ of mandate, minus Exhibits C, D, and G (CT at 249-94, 345-53, 409-15) 328

Declaration of James Nollan (CT at 565-70) 399

Answer to supplemental petition (CT at 581-86) 404

Judge Peck's second judgment and statement of decision (CT at 687-96) 412

Opinion of the Court of Appeal (177 Cal. App. 3d 719) 421

Application No. 4-82-90 (Nollan and Faria Beach Trust, Ventura County) Application of James & Marilyn Nollan and Faria Beach Trust to demolish single-family home, and construct 2-story single-family home on oceanfront, at 3822 West Pacific Coast Highway, Faria Beach, Ventura County,

heard at the California Coastal Commission meeting held at Shelter Island Marina Inn, 2051 Shelter Island Drive, San Diego, California, on Thursday, April 28, 1983.

REPORTED BY:

Helena Ellioff, RPR
4 Anchor Drive, #422,
Emeryville, CA 94608
(415) 654-6794

[1]

CHAIRMAN NUTTER: Agenda item 19 a., Application 4-82-90.

DISTRICT DIRECTOR RYERSON: Mr. Chairman and Commissioners, this item is before you as a result of a court action requesting—or sending it back as a remand for reconsideration in front of the Commission.

This item was originally approved on the administrative calendar in April of last year. At the time of that hearing, the applicant had made a request for a public hearing. However, under Commission rules, as you're obviously aware, it takes three Commissioners to pull an item off of the administrative calendar to hold it for hearing.

The applicant did not receive those three votes of the Commission, and, therefore, it was approved on the administrative calendar.

As is usual on the administrative calendar dealing with areas where Commission policy has been very clear in the past, there was no—the findings were extremely brief in that particular report.

In the Court Order remanding it to the Commission basically said your findings do not support the action and, therefore, hear it again. We are in the process still of completing the findings. Therefore, staff is recommending an open and continue on this item pending receipt by staff of an onging State Lands Commission [2] survey on this particular parcel that will determine whether or not the area in question is sovereign State lands or not. We expect that report to be available to staff within a couple of weeks or maybe a month.

The project itself is the demolition. It's located in the Faria Tract in northern Ventura County in an area that has a long and complicated Commission history in the past. Essentially there is an underlying landowner, the Faria Trust, and individual lesees of parcels on the—of individual parcels.

Much of the community is or was a couple of years ago very small beach cottages, almost cabins, and in the case of the house on this particular lot that was proposed for demolition—the existing house is only five hundred and twenty-one feet. There is an existing seawell.

The applicant is proposing to demolish the five hundred and twenty-one square foot house and build a house of approximately three times that size.

The basic issues before the Commission deal with, first of all, the question of sovereign land. Second, the

benefit burden analysis of the benefit to the landowner of building that house versus the burden to the public and, in addition, whether or not this constitutes new development.

The original administrative permit had [3] a lateral access condition and waiver of public liability. It is the access condition that the applicant is objecting to. That concludes staff presentation.

Once again, I would say this is recommended for open and continue pending the receipt of the State Lands report.

CHAIRMAN NUTTER: Thank you. We'll call on the representative for the applicant, Jo Lynn Lambert.

MS. JO LYNN LAMBERT: Thank you, Mr. Chairman. I'm Jo Lynn Lambert and I represent the applicants, Mr. and Mrs. Nollan, and there's only one issue here that anyone disagrees with and that is whether Mr. and Mrs. Nollan have to record the deed restriction for public access, so nothing else is in dispute.

Over a year ago, in fact, thirteen months ago, the permit was approved subject to this condition. The Nollans appealed to court and the court said that there was nothing in the record which justified that condition. In January, you as a Commission agreed to hold a hearing in accordance with that decision and since you have agreed to hold the hearing in accordance with the decision and since there is no further evidence at this time our first request would be that you drop the condition.

First I'd like to ask you, does everyone have a copy of that court decision?

[4]

DISTRICT DIRECTOR RYERSON: Mr. Chairman, the complete decision is not—or was not appended to the staff report.

MS. LAMBERT: I'd like that to appear as a substantative file document. It seems like it's rather crucial.

DISTRICT DIRECTOR RYERSON: It is available.

CHAIRMAN NUTTER: But I think the applicant's suggestion that the Commission have that available is not only appropriate but ought to be before us.

MS. LAMBERT: That will be Exhibit "A" of the handout you are receiving right now.

If you have read the staff report, you will see that no new information—no new factual information has been presented at this time.

Exhibit "B" in the handout you're receiving is the old staff report, if you need them for purposes of comparison.

Also, for the record, I'd like to correct—the new staff report has the house appearing as five times as large and the old one was three times as large. That's also how it appears in court. The numbers I'd be glad to discuss with you. The existing building is five hundred and twenty-one square feet in floor area. Livable floor space in the new building will be sixteen hundred and seventy-four square feet. The garage is covered rather [5] than being out in the open. That's four hundred and sixty-nine square feet. So that gives you a little idea of the numbers. The house is not as huge as five times as large.

There are two issues right now that I'd like to discuss. The first one is the delays that have been a part of this permit proceeding and the second is the two new issues that have been introduced in the new staff report.

As I explained to you already, the applicants approached this Commission—

CHAIRMAN NUTTER: Excuse me, did you say the two new issues that have been raised in the current staff report?

MS. LAMBERT: Yes.

CHAIRMAN NUTTER: Because earlier you said as I recall it that the old staff report and the new staff report really look almost the same.

MS. LAMBERT: Right. The facts that are presented in both are exactly the same. The reason that the staff is suggesting a continuance at this time is two new issues that were brought up. One is the question of whether it's sovereign land which would be subject to the public trust and the other is historic rights.

If you'd like, I'll address those briefly first.

Each of those issues we feel is not at [6] all critical to a determination of whether this condition that the staff has recommended and whether it is imposed at all. If the land is sovereign, if it's subject to the public trust, it's subject to that regardless of what the deed restriction says, so it's a totally separate issue.

If historic rights exist which the Commission went on record in '79 saying they did not exist, if those historic rights do exist, that also is something that the public has acquired and it's not going to change one way or another if that deed restriction is recorded. So, both of those issues—

CHAIRMAN NUTTER: You're saying both of those are irrelevant?

MS. LAMBERT: Yes. Thank you. As far as the question of delay, I'd like to give you a little bit of history. If you look at Exhibit "C", that's just to let you know

some of the history, but you don't need to refer to that right now. That just lets you know some of the history of what has been going on here.

It took eight months to appeal the decision and to get a hearing date in court and that was with one continuance by the Coastal Commission. The decision was issued in December and this Commission decided in January to hold a full public hearing on it. That public hearing was set for March. We received a call in our [7] office in early March saying that the staff would not be ready with the facts in that case because the staff person was ill and they suggested a couple of new dates which were thirty days and sixty days later.

We indicated that we were getting pressure from the owners of the property which are the Faria Beach Trustees, as well as we were eager to get going with this. We were told that, well, what had happened was the staff person that originally did the report had not been doing an adequate job and so that case had been reassigned to a new person who already had a caseload. So the upshot of all that was that we reached an agreement to hold the meeting today. I called about a week ago to the Commission staff to find out why I had not received a staff report with any new information. I was told that while they had requested a State Lands investigation, but, unfortunately, the person who was doing that investigation had left on vacation without finalizing the report, so we still have not seen any of that. We've gotten three different excuses for the reasoning behind the delays, and I don't know, I want to tell you it's really frustrating trying to get this through, trying to appease the Faria Beach Trustees who are sort of breathing down our back trying to get the building demolished and

the new one up to code, and so we are formally here protesting the fact that these continuances keep cropping up.

[8]

I'd also like to point out that your regulations have a forty-nine day rule where when someone files they're supposed to have a public hearing within forty-nine days. Well, today which again is being continued, is the seventy-seventh day since you decided to hold that public hearing.

I realize this is a slightly different procedure, but, at any rate, it's very frustrating.

I would like to make a proposal that is not going to solve the problem but if you don't want to vote today on dropping the condition, which would be our first choice naturally, the other proposal that I have would be to sever this dispute, the issue of whether or not to have this deed restriction recorded for public access. I would like to propose something that would sever that from the main permit so that that could go through and so that we can get on with demolishing and rebuilding, and that would be to have Mr. and Mrs. Nollan record a deed restriction with a clause that would make it under protest so that if it was later determined that the condition was imposed illegally or unconstitutionally that it would then become void or it could be removed.

And if it was found legal and justified by the facts that are presented later on and by court decisions or whatever, then it would be in good force and effect.

[9]

Now, this would allow Mr. Nollan to demolish and rebuild. It would allow the property to change hands and the Faria Beach Trust to be appeased. They also fully support the proposal. We have discussed it with them and they have

indicated that I can represent to you that they are behind this proposal and it would also allow the staff the time they seem to need to do the full factual analysis which has not been forthcoming so far.

Now, I have language that I can propose. I'd be glad to hand it out to you, or if you'd like me to discuss it with your attorney staff I'd be glad to, whatever you think is best. Any questions?

CHAIRMAN NUTTER: Does that, other than the suggested language you have, conclude your remarks at this point?

MS. LAMBERT: Yes, it does. I'd like to reserve the opportunity to respond if the hearing is continued and if further evidence or any evidence does come up later.

CHAIRMAN NUTTER: If the hearing is continued, it will be continued open so that there will be a full opportunity to address anything that subsequently sticks its ugly or not-so-ugly head up.

MS. LAMBERT: All right, thank you, Mr. Nutter.

[10]

CHAIRMAN NUTTER: You've raised a number of questions and you've indicated a certain amount of litigation and you've raised a microphone over at the staff table too. Roy Gorman?

CHIEF COUNSEL GORMAN: Commissioners, this is — and with apologies to the applicant here for any delays, we would point out first of all that on the Faria Tract area there have been some forty-three prior permits which the Faria Trust have agreed to access over. This is the first case in which I'm personally aware of — there might have been one or two others where the Trustees

have not agreed or the applicant has not agreed in the Faria Tract.

To the issue of looking for the information on State Lands, one of the major questions we face and it was in the knowledge of the staff at the time of the original application was that there was a high potential for public prescriptive rights which may or may not exist, the construction in the area and the possibility of some sovereign lands and in order to show the burden on public access which is one of the major issues which was before the court and the findings were inadequate, we thought it was appropriate to investigate that.

CHAIRMAN NUTTER: On the other hand, Ms. Lambert indicated that she didn't believe that was relevant, and I trust you heard her rationale.

[11]

CHIEF COUNSEL GORMAN: I understand that, but we believe that it is relevant. This is a de novo public hearing before this Commission and it's one of the issues which has been discussed routinely in access cases in the past, so we think it was a matter of the former decision, however, poorly stated in the findings which were, you know, inappropriately brief considering the nature of this dispute, perhaps. Nevertheless, we believe it's relevant and it's certainly relevant in the proceeding before this Commission at this time.

Finally, as to the proposal by Ms. Lambert to sever the question of access from the question of the project itself, this is not a unique request. As you know, there are a number of cases in which applicants wish to sever the difficult part of the issue where there is some sort of a

question of whether or not projects should go ahead without any conditions from the issue of what the condition should be and we feel that that would basically encourage further litigation on the point of the access because the applicant, of course, would have no incentive not to simply continue litigating the question of access even though the benefit of the permit, the governmental approvals, has been achieved.

So we would recommend against that consistent with what we have done in other cases over the years.

CHAIRMAN NUTTER: I want to be sure, Ms. [12] Lambert, that you have a full opportunity given the context to provide us with anything else you wish us to have and you did indicate you had a handout or at least language. I don't know whether that was something you wished to recite or whether that was —

MS. LAMBERT: I'd be glad to hand it out. Can I respond to Mr. Gorman's comments very briefly?

CHAIRMAN NUTTER: Yes. Why don't you do so briefly and while you're doing that perhaps our staff could get a copy of the language that you have.

MS. LAMBERT: Yes, I'd like to speak briefly to two points. The first one is that there have been several deed restrictions done in the Faria Tract earlier, but that does not mean those were correct or legal —

CHAIRMAN NUTTER: If we did it wrong several times, that doesn't mean we ought to keep doing it wrong is what you're saying?

MS. LAMBERT: Right, exactly. And nobody was able to object, so that may be the reason.

The second is that certainly the fact that we could settle part of it and go forward with the rest is not going to encourage us to litigate. Litigation is very expensive for everyone concerned, and certainly more so for the private citizen than it is for a government agency and it seems that we have been the ones to suffer [13] at least in these thirteen months since we have appeared before the Commission earlier for those delays.

CHAIRMAN NUTTER: Thank you, When Mr. Gorman or whoever it is that I ought to address the question to on staff would you expect this matter to be coming back to us? Mr. Ryerson I didn't ask for because I didn't see him. There he is.

DISTRICT DIRECTOR RYERSON: It is my understanding that the State Lands report will be available to staff within a week or two and that would mean that it could come back within a month or six weeks, and I'm sorry I can't give you more firm data than that because the staff person working on this is in San Francisco.

CHAIRMAN NUTTER: I assume that that report will also be made available immediately to Ms. Lambert?

DISTRICT DIRECTOR RYERSON: That would, yes.

CHAIRMAN NUTTER: Commissioners, are there any questions at this point? The staff has not placed a recommendation on our table and under our regulations in the absence of that we don't act, and I recognize, of course, Ms. Lambert's request and suggestion.

All right, the public hearing will remain open and the matter will come back to us I trust in a fairly short time frame. Thank you.

[14]

MS. LAMBERT: Thank you.

CHAIRMAN NUTTER: Nineteen b., 4-83-159.

MR. TOM PRATTE: Excuse me, point of order. I submitted a pink slip on that last one.

CHAIRMAN NUTTER: Well, I'm sorry, it's lost. Is there something for the good of the cause that you feel ought to be presented at this point? The public hearing will remain open and we just found your slip.

MR. PRATTE: Well, I've been waiting all afternoon and I did submit a slip.

CHAIRMAN NUTTER: Well, it has just surfaced and my apologies.

MR. PRATTE: Okay, I copied some maps —

CHAIRMAN NUTTER: We need your name for the record.

MR. PRATTE: Sorry, my name is Tom Pratte, and I'm with the Western Surfing Association.

CHAIRMAN NUTTER: In fact, before you continue, we've suddenly all kinds of slips with this number on it. I don't know who's been feeding them to us, and I assume at least on behalf of the applicant, Ms. Lambert, you were speaking on behalf of your client and anybody else in support of the position? Is that a reasonable assumption on my part?

MS. LAMBERT: Yes.

[15]

CHAIRMAN NUTTER: You've just said yes off the mike.

Our procedures typically are that when we're having a hearing only we hear from the applicant and then any opposition and since the public hearing remains open you've got a full opportunity not only in writing but orally to respond to anything that is on the record.

Mr. Pratte?

MR. PRATTE: Yes, I made just a few copies of maps I'd like to — maybe one for the staff and two for the Commission. They were both xeroxed out of these two books. One is a surfing guide to southern California and the other is Surf in California. One was published in 1973 and the other in 1977.

Personally I've ridden waves at Pietas (phonetic) Point from the outside to the inside, the outside areas and the inside area of the Point since eighteen years ago and this is classified as one of the best sites on the coast for beginners to learn how to surf and if access is lost for these purposes then novice surfers who have yet to get their act together riding waves will end up at places like Rincon where we have a freight train wave and crowds and it's a dangerous situation. It's like on a ski slope to take somebody who hasn't skied before and tell them they've got to go surf down the cornice.

[16]

So we are concerned about continued use of the ocean nearshore coastal waters in this area and lateral access seems to be a good method of providing that access to the ocean waves, and it's our understanding that these offers to dedicate easements are not open until a public agency accepts responsibility. In the meantime, I expect that public use will continue as it has in the past and in reviewing the Ventura County Land Use Plan that's just

been approved with the implementing ordinances, this lateral accessway seems consistent with that plan, and I have heard no objections from the applicant that state how this would be inconsistent with the Coastal Act.

That's the extent of my comments, thank you.

CHAIRMAN NUTTER: As I earlier announced, the public hearing will remain open and everybody will have another shot at it.

Ms. Lambert, you've got a question, I can tell.

MS. LAMBERT: Thanks. What I wanted to indicate is, is it possible to get a response from you on the language that I indicated? That was supposed to be a bandaid, to hold us over until whenever this hearing ends up—

CHAIRMAN NUTTER: You've made it clear [17] that you'd like us to act today and it's up to the Commission whether we do that or not subject to our regulations and I as the Chair at this moment without anybody overruling me have declared the public hearing to remain open so—

MS. LAMBERT: I'm just trying to clarify so that means that I wait until six or eight weeks whenever the—

CHAIRMAN NUTTER: I asked our staff roughly when we were going to have this back, because I do think you're justified in wanting some sort of conclusion or closing to our process in a timely fashion.

Mr. Ryerson?

DISTRICT DIRECTOR RYERSON: We would hope to be back in four weeks.

MS. LAMBERT: Is it possible to get a comment about the document that I suggested—the language that I suggested before that time?

CHAIRMAN NUTTER: We will have a staff report and I would expect that the staff report will address the language.

MS. LAMBERT: What I'm suggesting is that that is what the present condition—this is a suggestion for the present condition.

CHAIRMAN NUTTER: I understand that.

MS. LAMBERT: All right, I just wanted [18] you to understand that. If you understand it, I'm happy.

CHAIRMAN NUTTER: I understand. I understand that we're not doing quite what you've requested that we do and at this point I'm going to declare the public hearing open and continued open and we're going to go 19 b., 4-83-159.

MS. LAMBERT: Thank you.

* * *

[19]

CERTIFICATION

I, HELENA ELLIOFF, Registered Professional Reporter, hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in stenotype on the day and in the matter described on the first page hereof.

DATED: August 29, 1983.

/s/ Helena Ellioff
Official Hearing Reporter
California Coastal Commission

JAMES & MARILYN NOLLAN
FARIA BEACH TRUST
APPLICATION NO. 4-82-90

Hearing Before

CALIFORNIA COASTAL COMMISSION

MAY 26, 1983

SANTA BARBARA
CALIFORNIA

[1]

CHAIRMAN NUTTER: . . . And, we move to 7(a), Application 4-82-90, and I'm still assuming that our reporter is stronger than we are, and so we will keep going.

SOUTH CENTRAL DISTRICT DIRECTOR JAMES RYERSON: Mr. Chairman, Nancy Cave of the Central office staff will give the staff report.

STAFF ANALYST NANCY CAVE: Thank you, Mr. Chairman, members of the Commission. Staff is recommending that you approve this project subject to conditions; however, before I do the staff presentation I'd like to clarify some changes in the staff recommendation before you, as well as distribute some hand-out material.

We have recently discovered precise data regarding the development coverage of the particular site and we would like to clarify changes in the staff recommendation. On Page 2 in the Staff Summary, the second sentence should read: "The new development will be approximately three times the size of the existing structure."

Disregard the line about five times.

Then, on Page 11, we have three different changes to make: in the first paragraph, the fourth line down should

be deleted. The line that reads: "The applicant's proposed development will increase lot coverage by nearly five times from what exists presently on the site."

In the fifth, third line down, the 19 percent should be changed to a 63 percent.

Finally, in the last paragraph on that page, the last line, you should change the 70 to a 25 percent.

[2]

Also attachment "B" to the staff recommendation, we'd like to clarify for the record that this is not the applicant's site, however, it is of the general area of the Ventura coastline, as you can see from your exhibits which are attached.

Again, we are recommending approval with conditions. The project before you involves the demolition of an existing 504-square foot dwelling, and the construction of a new dwelling which will be approximately three times the size of the existing structure, involves further seaward encroachment towards an existing sea wall.

The staff is recommending that you approve this project subject to conditions requiring deed restrictions allowing for lateral access, limited to pass to re-pass; a waiver of public liability acknowledging the hazardous nature of this site; as well as an agreement by the applicant that the issuance of this permit and the completion of the authorized project will not prejudice any subsequent assertion of public rights. For example, prescriptive rights or public trusts.

This project was originally approved as an Administrative Permit by the Commission, and the applicant

appealed this decision to court. The Ventura County Superior Court found the Commission's action was not supported by substantial evidence in the Administrative record, and thus remanded it back to the Commission for a full public hearing.

Therefore, we have prepared a new staff recommendation with findings which we believe fully reflect the [3] Commission's past and present policy regarding new development situated between the sea and the first public road.

This development is approximately three times the size of the existing structure. It definitely moves further seaward, adjacent to public tide lands. There is an existing seawall between the proposed development and the public tide lands. There is uncertainty about whether or not that seawall is on public lands.

We believe that reconstruction of larger residential structures does present a burden on public access. The existing structure is a small, beach cottage style type dwelling. This tract was a vacation type tract dwelling structures. As these sub-standard structures are torn down, removed. and new structures come in, a new wall of residential development, as well as new demands on public resources, as public roads, etc., increase we believe that individually and cumulatively this project represents a burden on public access.

We also think that it is important to stress the history—the specific history of this tract, in we have had approximately 60 permits approved here, most of which involved demolition of sub-standard beach cottages and replacement with full-time. single family dwellings, and

or shoreline protective devices. Of these 60, 43 were approved with deed restrictions with lateral access. The remainding were either before we had the ability to have both the lease hold lessee and owner before us, in our Administration regulations, and the other one was for inland lots.

The Commission has been very consistent on this [4] issue in this tract. In 1979, the South Central Regional Commission wrestled with the issue of lateral access in this particular beach tract. At that time, the representative of the Faria family, which owned the tract, stated on the public record the Faria family had always given the public the permission to pass and repass along the ocean front.

The South Central Regional Commission, and the applicant's rep' concluded the most appropriate way of achieving lateral access opportunity for the public in this area was a deed restriction, limted to pass and repass. This was substantiated by the State Commission which found no substantial issue on the two appeals raised on this decision.

We believe that the findings before you fully reflect both the individual impacts and the cumulative impacts, as well as the precise history of this tract, and we believe that the Commission should find this to be new development, requiring a provision of lateral access, because of the burdens on public access to the shoreline, and along the shoreline.

Before we conclude. I'd like to turn the mike over to Cindy Long, to discuss some of the legal aspects of this case.

STAFF COUNSEL CYNTHIA LONG: Commissioners we have distributed a statement by Louis Allen, of the office of the Attorney General, regarding the issue of implied dedication on this project's site. Mr. Allen has concluded that in his opinion the beach in front of the Nollan residence had been impliedly dedicated to public use. Under Section 30211 of the Coastal Act, the Commission has the responsibility [5] to protect areas of historic use for continued public access. It is through the vehicle of the deed restriction that is proposed in this staff recommendation, that that public access can be protected.

It appears from all of the materials that we have reviewed that that condition is appropriate under these circumstances.

The applicants have also proposed language for satisfaction of proposed Condition 1, which condition requires recording of deed restriction allowing passive use, the right to pass and repass along the property. We have reviewed that language and distributed a memorandum dated May 24, 1983, from the Executive Director, that responds to some of the language that is proposed.

In our view the language submitted by the applicant should not be accepted by this Commission in satisfaction of the condition, if the Commission addopted the condition, because it contains an element of coercion or protest by the applicants that may actually jeopardize the validity of the document and certainly prohibit a public agency, or other parties, from using the area, because they may be intimidated by the applicants' statement of disagreement with the document.

There is also included within the document that they have proposed a list of uses that are precluded from the site. Those include camping and parties and sports activities, and exercising of animals, which in most circumstances we would agree with as being inappropriate for use here, but [6] also includes other activities which, and I quote, "Create a noise, public nuisance, or in any way invade the privacy of the residents."

In our view that language is extremely broad, and would be very difficult for the applicants—very difficult for members of the public to comply with, while using a beach area, even if they really are using it for walking and for hiking and for just traveling up to Faria Beach Park.

Therefore, we recommend that this language not be approved by the Commission. That concludes my presentation.

CHAIRMAN NUTTER: And, that concludes the staff report, I assume?

STAFF ANALYST NANCY CAVE: That's correct.

CHAIRMAN NUTTER: Now, this is a continued public hearing. It is also here on the basis of a court remand, and we did have in San Diego, as I recall, a reasonably full hearing dealing with the subject matter, and our normal procedures call for five minutes a side, when we have a matter coming back. I think, perhaps under the circumstances, we ought to extend it a bit. I have three sign-up slips, and these sign-up slips are designed in such a way that people cannot always understand how to mark them, I suspect, because you can be in favor of a project

and still think that the project ought to have some conditions, and I raise that question because I have three sign-up slips and I don't know whether everybody is together or not. I think we are going to have to inquire.

I assume that the representative of Nollan's, [7] and the Nollan's, are in favor of the project as we've heard, and then there is Jonathan Leach, I believe it is, of the South Central Coast Watch, and I would like to inquire Mr. Leach if you are here, whether you are assuming the same position as the Nollan's are? Perhaps we need you at the microphone. And, we need you name for the record. and I'm asking because procedurally I want to do this right.

MR. LEACH: My name is Jonathan Leach, and I'm here on behalf of Coast Watch to support the staff recommendation to approve the project with the conditions.

CHAIRMAN NUTTER: With the conditions that the staff has recommended?

MR. LEACH: Staff is recommending.

CHAIRMAN NUTTER: Very well. Our procedure then will be we'll treat you as if you were an opponent—

MR. LEACH: Okay.

CHAIRMAN NUTTER: —for organizing the hearing, the continued hearing, and let me inquire of the aplicant's, the applicant, or the applicant's representative, whom I assume is an attorney. given the fact that the Pacific Legal Foundation I believe was involved in the representation at some point in time. Mr. Hughes, are you ready to proceed? Very well.

Why don't we--well, you are ready to proceed with the hearing, how much time do you believe you require?

MR. HUGHES: Ten minutes.

CHAIRMAN NUTTER: Fine. Why don't we double the time then, give each side up to ten minutes, and I'll [8] run the clock, and we'll start with Mr. Leach.

But, before we start, Mr. Grossman.

COMMISSIONER GROSSMAN: I have a procedural question.

According to the staff report, the applicant is the lessee on the property, and you've indicated that the owner of the property, the Faria Beach Trust, has told the Commission that they have no objection to public use of the beach. Whatever their position may be, can the lessee itself be an applicant without the leasor, the underlying fee owner joining in the application?

STAFF ANALYST NANCY CAVE: Commissioner Grossman. when I was referring to the owners of the tract not objecting to public access, that was when the ownership was in the hands of the Faria family. The ownership is now in the hands of the Faria Beach Trust, and I do not know their position, other than they are watching this permit, and they are co-applicants in this matter.

COMMISSIONER GROSSMAN: Well, whatever—oh, they are co-applicants? So. We have both the owner of the property, and the lessee before us are co-applicants? Is that correct.

STAFF COUNSEL CYNTHIA LONG: That is correct, and the Faria Beach Trust has signed other deed

restrictions in the past that this Commission has required for development— new development on parcels in the Faria tract.

COMMISSIONER GROSSMAN: You're saying then that the co-applicant, which is the Faria Beach Trust, has signed off on the type of condition which you are recommending in this application?

[9]

STAFF COUNSEL CYNTHIA LONG: That's correct.

COMMISSIONER GROSSMAN: All right, because what threw me was a comment in the staff report somewhere that the applicant is the lessee, and you might want to go back and clean that up. I think it is at the bottom of Page 4, it says "The applicant holds a ground lease for the subject lot." And, you may want to clarify that applicant Nollan hold the ground lease. Thank you.

VICE CHAIRMAN MC NEIL: Mr. Nollan—I mean Mr. Hughes, I'm sorry. Would you like to know start your time?

MR. HUGHES: Yes, thank you, I would.

My name is Hal Hughes, and with me today is Mr. Nollan, the applicant.

To briefly summarize this matter, we are seeking a permit to demolish a sub-standard, single family resident, and replace it.

This matter has been to court, and when it was at the court before, the court held that there was no burden showed by the facts in the Administrative record, and that

conditions that were proposed at that time—the same conditions that are again proposed to you today, which include a dedication of up to 31 percent of Mr. Nollan's property —was improper, and it was remanded.

I would like to begin by correcting some further factual errors in the staff's recommendation.

The first is that there is no view of the coast available through the existing sub-standard residence. We've submitted, and you've no doubt not received pictures which [10] show that you cannot see the beach now from where the residence is. We have also submitted Mr. Nollan's declaration to that effect, but don't take his word, please check the photographs. The same will be true of the replacement home.

Second, the staff report refers to construction of accessory buildings. There will be no accessory buildings. They are not in the plans. There is no intention to build any. There simply aren't any, except in the staff report.

Third, the staff says the intensity of use will change, and that's correct. The intensity of use on the property will reduce. Right now, the substandard home that is there sleeps eight people and is used year round as a vacation rental. It receives heavy use. The new residence, while larger, will only accommodate four people. The intensity is reducing.

In addition there will be a formalized parking area, which will hold two cars. The staff report is correct in that. Presently, however, the lot has no parking area and can accommodate up to four cars, which simply pull up and park wherever they feel like around the building, so that in essence, the intensity will reduce.

The staff report doesn't mention what the court decision does, and that is the home that is being replaced is sub-standard. It is unsafe. Simply a look at the picture will show you that it's an eye sore on the coast.

Finally, in regards to the matter of the condition of dedication, the proving that there has been that much dedication already, it doesn't argue that Mr. Nollan also [11] has to give up dedication, but rather that adequate access exists nearby. More to the point however, if you had up from Ventura to Santa Barbara, you will find that it is almost a solid wall of public beaches, starting about four miles south of Mr. Nollan's property, you come first to the Emma Woods Beach, which runs for over a mile. Then, you come to Rincon Parkway, which runs for another mile. Then, the only other private development, Solimar, which runs for a half mile. Then, you are back on Rincon Parkway. Then, you come to the Faria Beach area, which is only 1.1 miles long, and on that there has already been two beaches dedication. the Faria Beach, and an area called The Coves, and then you come back to the Rincon Parkway for another two miles, and then Hobson County Park. In short, there is almost wall to wall beaches in that area already.

In this sense too, Mr. Nollan is being punished for previous dedications, as Mr. Grossman's questions pointed out, Mr. Nollan is the lessee of this property, but he is also a trustor and beneficiary of the Faria Beach Trust, which dedicated the whole Faria Beach Park.

In addition, an area called The Coves, which is only 1800 feet away from Mr. Nollan's property, is open to the public, through Mr. Nollan's and the other trustee's consent. In a sense, if he had a held this back, if he had never

dedicated this property, he could now be asked to dedicate it, but because he's given it up already, voluntarily, he's being asked to give up more in return for simply building a safe home to replace a sub-standard home.

[12]

Now, the staff's argued that there may be a prescriptive easement here. As your staff legal counsel ought to tell you, there can be no prescriptive easement unless the possession is adverse, that is, prescriptive easements only arise through adverse possession and where people give their consent to the public to use the beach, no prescriptive easement is created. As the pictures show, and as Mr. Nollan can testify if you wish, he has freely given his consent to people to use his beach. There are no "no tresspassing" signs there, and in short, there can't be any adverse possession because he's not adverse to the people using that area.

Now, you've received some vague declarations today from the state, an employee of the Department of Justice, indicating that the public has sometimes used this area. First off, the public has used it with consent. Second, none of those statements show any use above the mean high tide line. They all show use simply on the beach, and below the mean high tide line, of course, that's public property. Moreover, all those declarations show is use along the one-mile area of beach, which includes, which we have pointed out already, is The Coves and the Faria Beach. There is no indication, no statement by anyone that Mr. Nollan's property has been used, although we admit it has.

I'd like to spend a minute on a notion that may seem a little general, and that's the idea of fair play. At the last hearing before this Commission the staff did a nine-page report, which mentioned 18 substantative documents for

you to look at. Not one of the 18 was the court decision. [13] We pointed that out in this time around, and the court's decision has been supplied to you. The attorney that represented you in that case, Peter Kaufman, as well as your staff, admits that Judge Peck gave a fair hearing, that he fairly considered the matters, and no appeal was taken. We are back here to simply consider what to do with Judge Peck's decision.

At Page 6 of this staff report, the staff quotes the Judge, but they leave out two parts, and to me they are the most important parts. They are the guts of the entire opinion.

Three little dots tell you that they left out this part. The court says, "No such burden is shown by the facts in the Administrative record. The petitioner aren't building a single family residence on a vacant lot, but rather replacing a single family residence with another single family residence. Petitioners are not changing the use of the property. It does not appear that the replacement home is out of character with other houses in the area."

Then, they leave out an entire paragraph, and indicate that by three little dots. There the Judge says, "In ruling on coastal development permits, the Commission must make a case-by-case analysis of the evidence presented, to determine whether a burden has been placed on public access to the coast. A valid access condition must be supported by an evidentiary showing of direct and defineable adve[illegible]impact on public. Such evidentiary showing should either demonstrate immediate impact, or verifiable, non-speculative, [14] cumulative impact. Generalized policy

statements regarding the cumulative impact of single family residences as being built on vacant lots have no relevance to this case or support in the record."

Now, what has the staff given you in response to that order from the court? What direct, defineable and immediate impacts have they shown? Well, if you read the staff recommendation, you will find that there are lengthy heresay passages about conditions along the coast—or along the shore at Lake Tahoe. You will find several paragraphs talking about Santa Monica. You will find several more that discusses the situation in San Diego. You will find a couple paragraphs that discuss the potential for psychological barriers created by over building. There is no evidence that Mr. Nollan proposes a psychological barrier in the coast, and indeed, he has assurred me he wouldn't want to hurt anyone's psyche.

There is also a lot of speculation that if a lot of people did what Mr. Nollan wants to do, somebody would have to build gas stations in the area, and super markets, and restaurants. Again, gas stations, and super markets, and restaurants, aren't before you today, and when you look at what the court asks you to do, and remember that you were asked not to consider speculative matters, but verifiable definite matters, ask yourself what has your staff given you today?

Indeed, one whole page of the staff report discusses vertical access, which they don't even recommend, and isn't [15] an issue in this proceeding.

Now, it would be unfair not to mention that while they include a lot of irrelevant matter, they do supply some evidence, and that's a four-year old statement from Mr. Kilbourne about a separate beach, miles away and years ago.

It's a separate area. It's the Carpinteria, and that's submitted for your consideration. Supposedly, that's to show that somehow Mr. Nollan may be building on state land. But, the staff report, itself, shows that Mr. Nollan's residence is above the seawall, and that the seawall is probably above the high tide—the mean high tide, line, which means he couldn't be. Moreover, Mr. Nollan would be an unusually foolish builder to build his home where the tide would wash into it part of the year, and I assure you that he's not going to do that.

Finally, we've supplied again for the record, and I again doubt that you've received it, portions of a 1979 Commission hearing, in which this Commission was informed that the State Lands Commission had concluded that no state lands were involved, so that matter has already been passed on.

You may recall in the 50's, there was a Senator, whose name became a by-word with Americans for raising suggestions and then withdrawing them when there wasn't evidence to support it, and in this case what has happened to Mr. Nollan, is essentially you've been told he might be building on public lands, but please disregard it because we have no evidence to show it. In other words, the Commission has been told, [16] "Don't think about elephants. Whatever you do, don't think about elephants." And, now, Mr. Nollan and I are asked to respond to an allegation that the staff report refutes, an allegation that he somehow is building on public lands.

There has been severe delays in this case. The state law requires the Commission to act within 49 days, but since the court hearing there has been 100 days pass. We

are more interested though in the right decision, then in speed, and we ask the Commission consider the fact that this matter has been fairly heard by a Judge, with no biases for either side, a Judge that your staff would admit, heard the matter fairly.

And, we ask you to respect his decision. Consider it and evaluate it when you look at this, and allow Mr. Nollan to build his replacement residence. Thank you very much.

CHAIRMAN NUTTER: Thank you.

I assume that completes your testimony?

MR. HUGHES: Yes, it does, Mr. Chairman, thank you.

CHAIRMAN NUTTER: Thank you.

Commissioners, we have a—Mr. Leach, I had announced we were going to hear from you first.

MR. LEACH: That's okay.

CHAIRMAN NUTTER: And, since we haven't, we are going to afford a brief bit of time for rebuttal, if there is anything that comes up that requires rebuttal.

MR. LEACH: First off, I have a letter from South Central Coast Watch for the Commissioners.

[17]

CHAIRMAN NUTTER: Have you supplied a copy of that to the applicants?

MR. LEACH: No, I haven't.

CHAIRMAN NUTTER: I'll bet you they will receive one shortly.

MR. LEACH: Probably. One of you can share then, I guess.

COMMISSIONER GROSSMAN: Mr. Chairman, I think the record should reflect that they have received a copy of that letter now.

CHAIRMAN NUTTER: Yes. And, in fact the record will reflect subsequently that they will have an opportunity to respond to it.

Please proceed.

MR. LEACH: Thank you. Commissioners and Chairman of the Commissioners, rather, my name is Jonathan Leach, and I'm speaking on behalf of the South Coast—South Central Coast Watch today. We would like first off to commend the staff on their report, as thorough as we saw it to be, and in saying that we hope that this report should allow the Commission ample information to decide on the permit application today.

As the staff report reveals, with the change in density, or land coverage in this project, on the effected parcel there will be a decrease in the ease of access to the beach below the project. This coupled with the landward migration of the sea seriously impedes lateral access to the beach below the development.

[18]

The amount of public access available elsewhere, besides this project, should not be an issue here. The law allows for public access to beach and tide lands below the mean high tide line.

We support, therefore, the staff recommendation to approve the project subject to deed restriction conditions

to allow for lateral access to the beach, and urge that you do approve this project with those conditions, in the staff language. That's all that I would like to say today, thank you.

CHAIRMAN NUTTER: Thank you.

Mr. Hughes, rebuttal? It's a short letter.

MR. HUGHES: Very short.

The statement was short, so the rebuttal will be.

Mr. Leach tells you that the fact that there is other access nearby shouldn't be considered by the Commission, that that should be grounds for requiring more. Section 30212 says otherwise. It says if there's adequate access nearby then no new access is required. Mr. Nollan, and the other trustees, have been very generous in making their land available, and in dedicating it and we think that should be accounted in his favor, and not held against him —and used as Mr. Leach does to suggest that further exactions are required.

Thank you for your consideration.

CHAIRMAN NUTTER: Thank you.

That completes the public hearing.

Mr. Grossman.

[19]

COMMISSIONER GROSSMAN: Mr. Nollan, I have some questions for you. If you'd prefer to answer them, counsel, you are free to do so, but I'll let you make that decision.

Mr. Nollan, how old is the house that is on the property now?

MR. NOLLAN: It was owned by my wife's family. I believe it is in excess of 40 years old.

COMMISSIONER GROSSMAN: And, as I understand it, it's got septic system, and some bunk beds, in it? Is that right?

MR. NOLLAN: Yes, it does. We have also received a will-serve letter, to have a sewer hooked up to the house as the septic system is no longer being used.

COMMISSIONER GROSSMAN: Your lawyer indicated that it was unsafe. I take it, that your family has not used it as a single family residence? Is that correct?

MR. NOLLAN: We have not used that residence since last March, when we first applied for a Coastal Commission development permit. In terms of the purchase agreement which we made from the Faria Family Partnership, we were to demolish, and rebuild a new structure. We've been prevented from doing that and accordingly we've been prevented from using the house since that time.

COMMISSIONER GROSSMAN: The new structure will be the type of a structure that a family could live in full time if it wanted to?

MR. NOLLAN: That is correct.

COMMISSIONER GROSSMAN: Is that your intention?

[20]

MR. NOLLAN: That is our intention ultimately. Both my wife and I work in Los Angeles, and our two children attend school in Los Angeles, so there are some factors that have to be considered, but ultimately, we would like to live at the beach.

CHAIRMAN GROSSMAN: Over the years, then, what has this bunk bed structure been used for? What kind of use has been made of it?

MR. NOLLAN: Well, generally, it has been a summer home, however, in the last years, before we finally stopped using it, my wife and I have leased it during the summer for other persons to use as a vacation rental.

It is a cozy house, if you will, for a family or two families to enjoy the beach at. You can't hurt it.

COMMISSIONER GROSSMAN: Now, it was indicated that you can't view the beach from the road, and the photographs that have been passed around here, in Exhibit 3 of your April 1982 submittal, do reflect ocean on either side of the structure. Is the ocean that one sees on either side of the structure on your lot? Or does your lot line stop and start with the building itself?

MR. NOLLAN: I think that is very fair question. The pictures that you see today, were taken by myself on my way up here. Our lot extends southward about three feet from the existing structure, and northward about six feet from the existing structure.

Prior to the storms last January there were fences inbetween the existing structures that were at least my height, [21] which is about 5 foot, 10. There were also existing structures on both sides of our house. Those structures have subsequently been demolished, pursuant to Coastal Commission permits, and new double floored dwellings are being built in those places. So, those pictures are a bit misleading, but at this time, there is a view only because

there are two houses being rebuilt and we haven't replaced the fences that were knocked down during storms.

COMMISSIONER GROSSMAN: So, if somebody drives by today, they can see ocean through at least portions of your property?

MR. NOLLAN: Primarily through my neighbors' property, and through the portions of our property where the fences were knocked down in the prior storms.

COMMISSIONER GROSSMAN: How long is the lease that you own on the property?

MR. NOLLAN: At the time that we applied, we held the lease that would expire, I believe, in May of '82. At that time, the Faria Beach Trust was formed and purchased the property from the Faria Family Partnership. I am, along with my wife, a trustor, and a beneficiary of that trust. We paid a pro-rata share of the purchase price of the property, which was in excess of $12 million, for our house, and we make monthly payments to the Faria Beach Trust, which then, in turn, pays off the mortgage on the property.

COMMISSIONER GROSSMAN: Do you now have a lease hold on the property?

MR. NOLLAN: No, we do not. Our ownership is [22] consistent with the trust agreement, a copy of the memorandum of trust is attached to my declaration. I believe that is Exhibit 2. It also refers to the entire trust agreement, which was recorded in the County of Ventura, at or about the time of the purchase.

COMMISSIONER GROSSMAN: Now, you lawyer indicated that there has never been a "No Tresspassing" sign posted on your property? Correct?

MR. NOLLAN: That is correct.

COMMISSIONER GROSSMAN: Have you ever posted a sign anywhere on your property, including the beach, which stated in effect that permission to pass could be revoked at any time?

MR. NOLLAN: No, sir, in fact the only sign that I know of that has ever been placed on that property was the notice of the Coastal Commission permit application.

COMMISSIONER GROSSMAN: Now, many of your neighbors have given people lateral access rights to walk up and down the beach, as you are well aware, and sometimes the tides come up, making it difficult for people to stay between the mean high tide line and the surf. What's you objection to letting people continue on their journey as they walk up and down the coast?

MR. NOLLAN: Well, I think I can answer that question in the following way.

I have no objection, but I do believe there is a difference in philosophy between the Coastal Commission, and myself as to what the law requires me to give up, as [23] a condition to build a new house.

The court has reviewed those philosophies, and in this case made a decision, and up to this time the court has determine that my philosophy shall prevail. And, absent any new evidence I think that should be what is reflected in this Commission's decision.

COMMISSIONER GROSSMAN: So, then, you have no objection in principle to the concept of people continuing their journey up and down the coast. What you

object to is making it a lawful right, as distinguished from a right that you confer? Is that correct?

MR. NOLLAN: Certainly. It's being required to give it up that I object to, as opposed to out of my own good conscience and good will of allowing the people to use that area.

COMMISIONER GROSSMAN: Well, is there something short then of recording a deed of restriction giving the people the legal right to walk up and down the beach, that you would be willing to do, in order to assure them that they could do that without being run off with dogs, or a shotgun, or something of that sort?

MR. NOLLAN: I assure you that I have not engaged in those types of activities. We have previously tendered to the Commission a deed restriction under protest that would allow us to pursue our objection to the requirement of giving a deed restriction. We would execute it now, and then have the courts determine whether or not we are required under the Act to in fact give a deed restriction to our property.

[24]

COMMISSIONER GROSSMAN: Are you aware of the fact that you could execute a deed restriction in the form suggested by the staff and still pursue your legal rights to challenge the propriety of that restriction?

CHAIRMAN NUTTER: Before responding to that question, I think that is a legal question, and there may be differences of opinion—

COMMISSIONER GROSSMAN: I'll withdraw that question and let somebody else have the floor if they wish it.

CHAIRMAN NUTTER: Mr. McMurray.

COMMISSIONER McMURRAY: Yes, Mr. Chairman, I'd like some response from the applicant in regards to the staff report basically saying that the need for mitigation, which requires public access, is based upon principally two things. One being the increased intensity of use, and secondly, the adverse impact of this use. Could you identify how you look at those two items, in regards to the proposed development?

MR. HUGHES: If I may, Commissioner McMurray, I'll respond to that.

On the intensity of use, you will note that in the staff report—

CHAIRMAN NUTTER: We need you closer to the microphone because we are taping this.

MR. HUGHES:—thank you, Mr. Chairman. In the staff report, the staff only refers to a change in intensity. Our contention is it is reduced intensity, that a residence now that capable of and has housed eight people is being replaced with a non-substandard residence, which will only [25] hold four, so that reduction in intensity, or as the court found, it is simply a change—a replacement of one single family residence with another single family residence. It is certainly not an increase in intensity, and of course, our second argument is that there is adequate access nearby, within 1800 feet.

COMMISSIONER McMURRAY: Do you see any adverse impact of this proposed development?

MR. HUGHES: No, but I also don't see that adverse impacts are a grounds for dedications. In other

words, it is adverse impacts on public access, and here there would be none, since the intensity is reduced.

COMMISSIONER McMURRAY: Thank you.

CHAIRMAN NUTTER: Thank you. Mr. MacElvaine.

COMMISSIONER MacELVAINE: On the question of potential abuse. Back in the days when the decisions were made on Faria they were made because we were denying permit after permit. We couldn't get access. And, the Faria—this is really recalling the Regional history, when I sat on that Commission—but we attempted to set up a mechanism through the lessor of all of the properties to gain some kind of uniform access through the area, and if we accept the concept that a party in the middle of the row not dedicate, what we've really done is it is possible—I don't think this gentlemen would do it—but on some subsequent owner of the house might prevent access across that area, which would require people to turn around, go all the way back and come around the other way. You've broken the lateral move of [26] people through the area, which was really the original intent the Commission was after.

MR. HUGHES: I understand the concern, Commissioner MacElvaine. At first, I would have to agree with you that's not this case. I mean, in other words, it seems unfair to Mr. Nollan, "Mr. Nollan there is no evidence that you've done that to the public, but just because some hypothetical bad man might someday do it in a future application, and to prevent that bad man in the future from doing it, we're going to take your property away, in return for a permit."

Second, that turns on the old argument of cumulative impact. That is, sometimes when you can't show an individual impact, the device that seems retreated to in these reports in cumulative impact, which boils down to an argument that this one person might not be having any impact, but if 100,000 people did the same thing, it would have an impact.

Frankly, there is nothing in life that if done by 100,000 people all at the same time, wouldn't be objectionable. I mean, if I were to stamp my foot—that may not be—but if everyone in the room began stamping their feet at once, the cumulative impact would be serious. Essentially, that boils down to an admission that there is no impact here. It is the concern that if 100,000 people do it, and that's not—that's not the case before this Commission. When those people come in and you see it happening, then you should be concerned.

Finally, the legislature was concerned about making adequate access to the coast available, not universal [27] access, in other words, the Coastal Act does talk about maximum access, and maximizing access while respecting private property rights, but it talks about not requiring it where adequate access already exists.

Now, suppose—the legislature couldn't have put that in and yet had in mind that the entire coastline be taken back. The idea seemed to be that it would be adequate, so that when the staff says to you there are beaches all around here, and people elsewhere along here have dedicated and say, "Now require him to dedicate, because it will give us an unbroken ribbon." They are proving that they are not fitting within the Coastal Act, which says, "If there is access nearby." You don't require more access just because you've already got some. I mean, that

is sort of the glutton argument, you know, I've had a little candy, I need a lot.

What the legislature said is when you've got enough stop. And, that's what we are asking you to do here.

CHAIRMAN NUTTER: Thank—

COMMISSIONER MacELVAINE: Well, Mr. Chairman, one last comment on the concept of what we were attempting on the Faria property, is that—and here again it may not be his client—but if one on either side does the same thing, then you've got a land-locked piece.

MR. HUGHES: Except that there is vertical access through at several points, including The Coves, which my clients have already made available to the public, and Faria Beach. I mean, in other words he gave at the office! Is what I'm saying. This man gave at the office, and now you [28]are saying, "Come on give again."

COMMISSIONER GROSSMAN: And, now he wants to take away at home.

MR. HUGHES: No, he doesn't want to take it away at home. He simply doesn't want to be required to dedicate it as a matter of law, in return for replacing a substandard housing. He believes that he should be free not to have to do that.

CHAIRMAN NUTTER: Mr. Grossman.

COMMISSIONER GROSSMAN: Mr. Chairman, I'm going to make a motion to approve the application per the staff recommendation for the reasons set forth in the staff report, with the following embellishment.

The issue of vertical access is really unrelated to this application. The fact that he gave vertical access at the

office is irrelevant. What we are concerned with is what the person who has vertical access does with it. Do they simply walk to the end of the accessway, look at the ocean, and turn around and come back, or do they enjoy the opportunity of walking along the coastline? And, I think they ought to be able to enjoy that right free of risk of having the Sheriff called out to run them off, or having rocks thrown at them, or being shot at, or anything else that a private property owner might think that he or she has the right to do.

The photographs that have been passed around show that there is both an individual and a cumulative impact, with respect to this particular site. The present structure [29] is single story, in the words of the applicant, it is unsafe, it's a eyesore on the coast. It is not committed to year round, permanent, single family use. Instead its use has been transitory, limited, and during the summer of vacation months only.

The new structure is going to be permanent, self contained, utilities, including sewage. It is going to be taller in scope, larger in scope, and wider in scope, and it will undoubtedly obliterate most of that view of the coast.

The two structures on either side have recently been demolished, so that when you look at both the individual and cumulative impact of this structure, you can see the imperative of guaranteeing uninterrupted, lateral access passed this house, as well as the adjacent houses.

For all of these reasons, and the additional reasons set forth in the staff report, and the fact that there appears to me to be implied dedication to the public through historical use, I make the motion I make.

I believe the Civil Code provides the land owner with the opportunity of posting in such a way as to make it clear that permission to pass can be withdrawn at any time, and this property has not been so posted, so there has been no indication to any member of the public that this use, historically, has been consentual, in fact, I believe that under the applicable authorities it has been adverse to the ownership of this home owner, and that's my motion.

CHAIRMAN: Is there a second—

COMMISSIONER FRANCO: I second the motion.

[30]

CHAIRMAN NUTTER: —to the motion part of the discussion?

Mr. Franco.

I wonder, given the fact that this is a court remand, and there are legal issues, and we are trying to struggle with them as best we can at this stage, whether there are any further bits of advice that we need from our counsel, or from our staff?

Maybe not?

STAFF ANALYST NANCY CAVE: Okay, I think we are going to share the mike on this one.

I would like to clarify one thing for the Commission, if you look on Exhibit 3 of the staff report, you can see the location of where the Faria Park is, where The Cove is, and as Commissioner MacElvaine was pointing out, the Nollan lot is between these two sites. We are suggesting that the public be allowed to continue to visit both sites along the shoreline in this tract, and with that I will turn it over to Peter Douglas.

DEPUTY DIRECTOR PETER DOUGLAS: Just one point, Mr. Chairman, and members of the Commission.

CHAIRMAN NUTTER: Mr. Douglas.

DEPUTY DIRECTOR PETER DOUGLAS: That is relative to the question of new development, and its applicability to the access Policy 30212.

I participated in the legislative deliberations on this, as your staff representative, and as this particular issue was discussed, several times, in terms of whether or not [31] demolition of an existing structure and the construction of a new structure ought to be exempted from the access policies. The legislature made it a specific point not to do that. I think I just want to add that to the record.

And, that's all I have.

CHAIRMAN NUTTER: We have—oh, Miss Long.

STAFF COUNSEL CYNTHIA LONG: If I may just add a little bit more.

I want to remind the Commission that we are reviewing this proposed development within the context of the Coastal Act, and that this development may well last longer than the particular applicant who is before you, who seems to have expressed his willingness in the past at least, to allow the people to use the beach, but the development may, in our view, impose a burden on public access, and requires the dedication.

And, the proposed condition is the result of negotiations between the Commission, in the past, and the Faria family, and the Faria Beach Trust, that resolved the dispute over access, in the form of a deed restriction, to allow

the Faria and the lease holders, and the soon-to-be-land holders, to have a fair amount of control over their property, more than what might exist, if we had required an easement, to be offered to be accepted by a public agency or a private association, which is the type of condition that we would normally recommend, with a similar type of development, in similar circumstances.

CHAIRMAN NUTTER: Commissioners, we have a motion, [32] which is approval per staff, call the roll.

STAFF ASSISTANT GOEHLER: Commissioner Callahan?

COMMISSIONER CALLAHAN: Yes.

STAFF ASSISTANT GOEHLER: Commissioner Franco?

COMMISSIONER FRANCO: Yes.

STAFF ASSISTANT GOEHLER: Commissioner Grossman?

COMMISSIONER GROSSMAN Yes.

STAFF ASSISTANT GOEHLER: Commissioner King?

COMMISSIONER KING: Yes.

STAFF ASSISTANT GOEHLER: Commissioner MacElvaine?

COMMISSIONER MacELVAINE: Yes.

STAFF ASSISTANT GOEHLER: Commissioner McInnes?

COMMISSIONER McINNES: No.

STAFF ASSISTANT GOEHLER: Commissioner McMurray?

COMMISSIONER McMURRAY: No.

STAFF ASSISTANT GOEHLER: Commissioner McNeil?

VICE CHAIRMAN McNEIL: Yes.

STAFF ASSISTANT GOEHLER: Commissioner Shipp?

COMMISSIONER SHIPP: Yes.

STAFF ASSISTANT GOEHLER: Commissioner Wornum?

COMMISSIONER WORNUM: Yes.

STAFF ASSISTANT GOEHLER: Commissioner Holmdahl?

COMMISSIONER HOLMDAHL: Yes.

STAFF ASSISTANT GOEHLER: Commissioner Nutter?

CHAIRMAN NUTTER: Yes.

STAFF ASSISTANT GOEHLER: Ten, two.

CHAIRMAN NUTTER: The motion carries, and the application is approved as conditioned.

[33]

CERTIFICATION

I, PRISCILLA PIKE, an official hearing reporter for the California Coastal Commission, whose office is located at 631 Howard Street, 4th Floor, San Francisco, California; DO HEREBY CERTIFY that I

have transcribed my stenographic notes for Application No. 4-82-90, JAMES & MARILYN NOLLAN/ FARIA BEACH TRUST, before the California Coastal Commission on May 26, 1983; THAT THE PRECEEDING 32 pages constitute a true record of the testimony reported by me on the above entitled date.

DATE: August 31, 1983

/s/ PRISCILLA PIKE
2006 Saviers Road
Oxnard, CA 93033
(805) 486-8525

FINDINGS.

Application No. 4-82-90 (Nollan and Faria Beach Trust, Ventura County) James & Marilyn Nollan and Faria Beach Trust granted permit with conditions to demolish single-family home and construct 2-story single-family home, on oceanfront at 3822 West Pacific Coast Highway, Faria Beach, Ventura County,

heard at the California Coastal Commission meeting held at Burton Chace Park, end of Mindanao Way, Marina del Rey, California, on Thursday, June 23, 1983.

REPORTED BY:

Helena Ellioff, RPR
4 Anchor Drive #422
Emeryville, CA 94608
(415) 654-6794

[1]

CHAIRMAN NUTTER: We have several sets of findings and I don't know whether there are any staff comments required for any of them. I think not and we have no requests to speak—

COMMISSIONER MacELVAINE: There is one on the first one.

CHAIRMAN NUTTER: Well, there may be a question or comment from us, but I have no sign-up slips on 26 a. 4-82-90, the findings. Mr. MacElvaine?

COMMISSIONER MacELVAINE: On the Nollan findings, and I'm going to ask staff to help me on this. You get around to page 17, and we're referring to the fact that the concept of adequate access nearby. One thing that Nollan does, if it does come through the court a second

time and the court makes the same finding, is it will allow a potential offer to dedicate in the middle of a series of offers to dedicate to suddenly disappear.

So even though we can look down the coast and up the coast except for Mr. Nollan, we have acceess, but if another party has the same situation that we're planning on combining all these together to make this fluid access does the same thing, we're going to have landlocked access areas that are not available to the public and I think that somewhere in the findings we need to discuss the fact that taking a chunk of an access that we had counted on ont really causes an inability [2] for continuity and it's blocking access in the long run. I don't think that's really thoroughly explained in here and I hope that that's something the court hears.

CHAIRMAN NUTTER: Staff? Ms. Cave?

STAFF ANALYST CAVE: Thank you, Mr. Chairman. We did cover very briefly that item on page 17. If Commissioner MacElvaine would like us to augment that, we'd be happy to do so.

COMMISSIONER MacELVAINE: I would like you to do that becafise that was one of the court's main complaints. You had plenty of access and he can look down there and see we've already taken offers to dedicate in both directions. People had access up to the Nollan lot from both sides but if that happened three or four lots down or twenty lots down that could landlock that whole area.

EXECUTIVE DIRECTOR FISCHER: If that's the direction of the Chair, I feel I have the sense of Mr. MacElvaine's feelings and I can get those findings in there modified without having to bring them back to you.

CHAIRMAN NUTTER: So, you're proposing that we make a motion including the comments that Mr. MacElvaine has included.

COMMISSIONER KING: So moved.

COMMISSIONER MacELVAINE: Second.

[3]

CHAIRMAN NUTTER: Moved by King, seconded by MacElvaine and all in favor who are eligible?

(Eight in favor)

They're approved.

* * *

CERTIFICATION

I, HELENA ELLIOFF, Registered Professional Reporter, hereby certify that the foregoing is a true and correct transcript of the proceedings taken by me in stenotype on the day and in the matter described on the first page hereof.

DATED: August 29, 1983.

/s/ H. Ellioff
Official Hearing Reporter
California Coastal Commission

RONALD A. ZUMBRUN
HAROLD J. HUGHES
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154
Attorneys for Petitioners

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF VENTURA

Civ. No. SP 50805

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION.

Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF ARMINISTRATIVE MANDAMUS (CCP § 1094.5)

(Filed July 15, 1983)

Petitioners, James Patrick Nollan and Marilyn Harvey Nollan (the Nollans), petition this Court for a further writ of mandate under Code of Civil Procedure § 1094.5, directed to respondent. California Coastal Commission, and by this verified petition represent that:

1. Petitioners, James Patrick Nollan and Marilyn Harvey Nollan, are the lessees of a small piece of property along the Pacific Coast Highway in Ventura County, California. Near the property are both Faria County

Park, with a public beach and recreational facilities, and the "Cove," a privately-owned beach on which public access is allowed.

2. The Nollans applied to the California Coastal Commission (Commission) for a permit to demolish a substandard beach house and replace it with a three-bedroom residence for their family. The proposed home will accommodate fewer people than the existing house. The public has never had a right to use the beach above the mean high tide line and the view will not be affected by the replacement housing. Nevertheless, the Commission, quoting from its Statewide Interpretive (Shoreline) Guidelines for Public Access (Public Access Guidelines) found that replacement of the substandard house would "burden" public access to the beach by "discouraging the public from visiting the shoreline because of [the home's] physical proximity," and based upon unsupported speculation that it would congest the access roads and recreation areas, consume off-street parking, and increase the use of the beach by residents and guests.

3. According to the Commission, a single-family home would become consistent with the Coastal Act of 1976 (Coastal Act) if the Nollans would agree to dedicate their entire beach area, which comprises nearly a third of the property, to public use.

4. On January 18, 1983, after hearing, this Honorable Court ordered a peremptory writ of mandamus to issue requiring the Commission to hold a public hearing and "make proper evidentiary findings." The Court stated that a "valid access condition must be supported by an

evidentiary showing of direct and definable adverse impact on public access" and concluded that "[n]o such burden is shown by the facts in the administrative record."

5. On remand, after changing hearing dates twice, and continuing the hearing for a month, the Commission, relying on its Public Access Guidelines and generalized findings, again required the Nollans to agree to dedicate their entire beach area, comprising nearly one-third of the property, to public use to obtain a permit.

6. In order to expedite demolition and construction pending further Court review, petitioners offered to make the required dedication under protest. The Commission would not accept dedication under protest and instead required petitioners to submit an offer "that does not contemplate a legal challenge to the Commission's action on the permit."

7. Because abundant public access to the beach already exists nearby, and because the Nollan home would have no effect on public access, the access condition is not authorized by the Coastal Act. The Nollans seek Court relief in order to build their home without first dedicating their beach to public use.

8. Petitioners also challenge the validity of the Commission's Public Access Guidelines, attached hereto as Exhibit A, as being violative of the Coastal Act, Public Resources Code §§ 30000, *et seq.*, violative of the duties imposed upon the Commission, and in excess of its jurisdiction. The Commission's stubborn insistence on the dedication demanded of petitioners was unavoidable under the guidelines.

9. Petitioners seek a writ of mandate to compel respondent to carry out its duties to promulgate guidelines in accordance with the provisions of the Coastal Act (Public Resources Code § 30620(a)(3)), article I, section 19 of the California Constitution, and the Fifth and Fourteenth Amendments to the United States Constitution.

THE FORCED DEDICATION OF ACCESS

10. Petitioners, Nollans, are now, and at all times relevant herein have been, lessees of a developed parcel of real property commonly known by street address as 3822 Pacific Coast Highway, Ventura, Ventura County, California (the property). The property is specifically described in Exhibit B attached hereto and incorporated herein by this reference.

11. Petitioners, Nollans, are now, and at all times relevant herein have been, in the process of purchasing the property from the Faria Beach Trust. The trustees of the Faria Beach Trust are currently holding title to the property subject to its transfer to the Nollans.

12. Respondent, Commission, is now, and at all times relevant herein has been, the agency charged with administering provisions of the Coastal Act. Respondent is charged by law with the duty to adopt only such guidelines as are not in conflict with the provisions of the Coastal Act, nor enlarge the powers of the Commission in violation thereof. Public Resources Code § 30620 (a) (3). Petitioners have a clear, present, and beneficial right to the performance of said duties.

13. During December, 1981, and January, 1982, the Nollans and trustees of the Faria Beach Trust executed a

series of documents providing that, upon the fulfillment of various conditions by the Nollans, title to the property would be transferred from the trustees to the Nollans.

14. Among the conditions referred to in Paragraph No. 13 herein was the requirement that the Nollans either agree to bring the structure then existing on the property into conformity with all existing and applicable building, health, and safety code requirements or agree to demolish the existing structure and agree to replace it with one meeting all existing and applicable building, health, and safety code requirements.

15. In order to meet the specific condition described in Paragraph No. 14 herein, and because it was not possible to bring the existing structure up to code, the Nollans determined to demolish the existing structure and replace it with one meeting existing and applicable building, health, and safety code requirements.

16. On or about February 22, 1982, the Nollans and trustees of the Faria Beach Trust filed an Application for Coastal Development Permit with respondent for a permit to construct a single-family dwelling with attached garage on the property.

17. Petitioners were informed that their application had been placed on the administrative calendar for the April 7, 1982, Commission public hearing in Eureka, California, and were mailed a copy of a "Project Information" compilation presumably prepared by respondent's staff. A copy of said Project Information appears in the Administrative Record (AR) previously filed herein at Page Nos. 37-40 and is incorporated herein by this reference.

18. Petitioners were unable to attend the April 7, 1982, Commission meeting because of the burdens involved in traveling to Eureka from their residence in Los Angeles County, a distance of some 630 miles.

19. Petitioners were given the option of attending a South Central Coast District pre-commission meeting workshop in Santa Barbara, California, on April 1, 1982. Petitioners were told that a member of respondent's staff would receive comments regarding various applications from persons who were unable to attend the Commission hearing in Eureka, and would then relay said comments to the Commission at respondent's meeting of April 7-8, 1982, in Eureka, California.

20. Because petitioners would be unable to attend the April 7, 1982, Commission hearing in Eureka, petitioner, James Nollan, appeared at the South Central Coast District pre-commission meeting workshop on April 1, 1982, and presented written and oral objections to the imposition of the lateral access conditions recommended on Page 2 of the Project Information, AR at 38. A copy of the written objections appears at AR 57-80 and is incorporated herein by this reference.

21. On or about April 7, 1982, a public hearing was held in Eureka, California, before respondent concerning petitioners' application.

22. Petitioner James Nollan's entire April 1, 1982, presentation was orally summarized at the Commission hearing in Eureka as follows:

"The applicants contend that based on the Pacific Legal Foundation Court of Appeals decision that the Commission should no longer be requiring public access in these types of situations." AR at 89.

23. On or about April 7, 1982, respondent decided to grant petitioners' permit, subject to certain conditions.

24. On or about April 14, 1982, petitioners were informed of respondent's decision to approve their permit with conditions. A copy of the Notice of Intent to Issue Permit appears at AR 47-50 and is incorporated herein by this reference.

25. Among the conditions imposed by respondent's decision, special condition No. 1 (the access condition) required that petitioners, without compensation

"shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution."

26. The area to be dedicated to public use in accordance with special condition No. 1 constitutes approximately 30% of petitioners' property.

27. On June 3, 1982, petitioners initiated the instant action by filing a Petition for Administrative Mandamus.

28. On January 18, 1983, this Honorable Court issued a Judgment Granting Peremptory Writ of Mandamus and a Statement of Decision directing respondent to hold a public hearing and to "make proper evidentiary findings, and take action on Permit No. 4-82-90 in accordance with this decision."

29. In its initial return to the Court's peremptory writ of mandamus the Commission scheduled a hearing on petitioners' application for March 21, 1983. Subsequently, the hearing was rescheduled to April 26, 1983, more than 49 days after notification of the Commission's decision to hold a public hearing. Pub. Res. Code § 30621.

30. The Commission opened a hearing on petitioners' application on April 28, 1983, in San Diego. Neither the Commission nor any member of the public presented any new evidence which had not been part of the earlier record. Although 18 substantive file documents were listed on the staff report, a copy of this Court's Statement of Decision had not been made a part of the Commission record until supplied by petitioners. Over the objection of petitioners, the Commission followed a staff recommendation that the hearing be continued. A copy of the staff report is attached hereto as Exhibit C and is incorporated herein by this reference.

31. The Commission hearing continued on May 26, 1983, in Santa Barbara. In response to this Court's statement that "[a] valid access condition must be supported by

an evidentiary showing of direct and definable adverse impact on public access," the staff report identified only generalized or speculative "findings and declarations," including: (1) unsubstantiated speculation regarding potential public ownership of some undefined portion of the petitioners' property; (2) hearsay regarding access conditions and the shoreline in other parts of the nation and state (including Lake Tahoe, Santa Monica, and San Diego); (3) unsupported suggestions that replacement housing "would present an psychological barrier to the public;" (4) speculation that "the public may get the impression that the beach front is no longer available for public use;" (5) an entirely unsupported assumption that further reconstruction of houses will require construction of "[f]acilities such as stores, gas stations, and restaurants;" (6) an irrelevant discussion of the importance of vertical access; and (7) the incorporation of a letter and two pictures relating to a different area of the coast, which had been submitted four years earlier in connection with an entirely separate application. A copy of this Staff Report and Recommendation is attached hereto as Exhibit D and is incorporated herein by this reference.

32. Within two hours of the continued Commission hearing on May 26, 1983, the Commission provided mimeographed form declarations from 18 surfers who claimed to have trespassed in the general vicinity of petitioners' property. The declarations did not specify use of petitioners' property and none indicated use above the mean high tide line.

33. At the continued hearing on May 26, 1983, the Commission, by a vote of 10-2, adopted the Staff Report

and Recommendation. In its decision the Commission, relying on and quoting from its Public Access Guidelines, reimposed special condition No. 1 (the access condition), as identified *supra* in Paragraph No. 25 of this petition.

34. At both the hearing on April 28, 1983, and the continued hearing on May 26, 1983, petitioners offered to record, under protest, the deed restriction required by the Commission. This deed restriction was offered by petitioners in order to preserve the rights of both parties pending further Court review, while allowing demolition of the substandard house and construction of the replacement house to begin. A copy of the proposed Deed Restriction is attached hereto as Exhibit E and is incorporated herein by this reference.

35. On the recommendation of its Executive Director, attached hereto as Exhibit F and incorporated herein by this reference, the Commission refused to allow dedication under protest and instead required "the Nollans to submit an offer . . . that does not contemplate a legal challenge to the Commission's action on the permit."

36. Subsequent to petitioners' request for preparation of the administrative record, and three weeks after the Commission's decision, petitioners' counsel received the revised Staff Report and Recommendation which is attached hereto as Exhibit G and and is incorporated herein by this reference.

37. An extensive number of public beaches are available within three miles either side of petitioners' property. In particular, the Faria County Park, an oceanside public park with a public beach and recreation area, is within one-quarter mile of the Nollan property and was donated to the

public by the Faria Family, the predecessors in interest of the land held by the Faria Beach Trust. In addition, the "Cove," a privately-owned beach on which public access is allowed, is located within 1,800 feet of the Nollan property.

38. The public has not acquired, through use or legislative authorization, any prescriptive easement or the right to use the dry sand above the main high tide line on petitioners' property.

39. Any view of the coastline from the old Pacific Coast Highway and also from the new freeway will not be affected by demolition and reconstruction of petitioners' single family residence. A copy of Mr. Nollan's declaration, submitted to the Commission prior to its May 26, 1983, hearing is attached hereto as Exhibit H and is incorporated herein by this reference.

THE PUBLIC ACCESS GUIDELINES

40. Respondent, Commission, is empowered and has a duty to adopt only such guidelines as are not in conflict with the provisions of the Coastal Act, nor to enlarge its powers in violation thereof. Public Resources Code § 30620 (a)(3) provides in relevant part that the Commission shall adopt

> "[i]nterpretive guidelines designed to assist local governments, the regional commissions, the commission, and persons subject to the provisions of this chapter in determining how the policies of this division shall be applied in the coastal zone prior to certification of local coastal programs; provided however, that *such guidelines shall not supersede, enlarge, or diminish the powers or authority of any regional commission, the commission or any public agency.*" (Emphasis added.)

41. Respondent, Commission, has promulgated the Public Access Guidelines, attached hereto as Exhibit A, pursuant to the Coastal Act purportedly to enable it to carry out the purposes and provisions of the Act.

42. Respondent's Public Access Guidelines serve as its interpretation of the Coastal Act's requirements and serve as directives as to how the policies, purposes, and express provisions of the Coastal Act shall be applied.

43. Said Public Access Guidelines "explain the public access provisions of the [coastal] Act [and] . . . indicate when the public access provisions are applicable to a given project and the type (vertical and lateral) and amount (including area and appropriate uses) of access which should be provided." Public Access Guidelines, Part No. I at 1.

44. Despite the provisions of Public Resources Code § 30212, the Commission's Public Access Guidelines provide:

> "[A]ll new development resulting in any intensification of land use generates sufficient burdens on public access to require access conditions in conjunction with that development." Public Access Guidelines, Part No. 2(B) at 5.

45. The Commission's Public Access Guidelines provide additionally that the necessity for accessways in development projects is determined by "the appropriateness (*i.e.*, need) of access rather than on the type of development proposed." Public Access Guidelines, Part No. II(B) at 7.

46. Despite the provisions of Public Resources Code § 30212(a)(2), said Public Access Guidelines provide further at Part No. III(D)(3) as regards the necessity to require that lateral accessways be dedicated as a condition to coastal development permit approval as follows:

> "Although the question of whether adequate access exists nearby applies to the siting of both lateral and vertical access, the Commission has generally found that access along the shoreline is not adequate to serve the public needs . . . ."

47. Petitioners are informed and believe, and thereon allege, that respondent requires the dedication of lateral and vertical access easements as a condition to approval of projects which do not constitute "new development" and without regard to the type, nature, or character of the development proposed.

48. The Public Access Guidelines are invalid in that: (a) they are in excess of the Commission's jurisdiction and authority to promulgate or implement, (b) they contravene the provisions of the Coastal Act because they require dedication of accessways not related to "new development," (c) they contravene the provisions of the Coastal Act because they require dedication of accessways without consideration of whether adequate access exists nearby, and (d) they contravene due process guarantees because they require dedication of public accessways without regard to the type, nature, or character of the development proposed or the burden on access created thereby.

49. The Public Access Guidelines are invalid in that the Commission's interpretation of what constitutes "new development" contained in said guidelines violates the statutory distinction between "new development projects" and "development." Said failure to maintain the legislative distinction between "new development projects" and

"development" results in invalid vertical and lateral access dedication requirements.

50. The Public Access Guidelines are invalid in that they contravene article I, section 19 of the Constitution of the State of California and the Fifth and Fourteenth Amendments to the Constitution of the United States, are in excess of the Commission's jurisdiction and authority to promulgate, and contravene the provisions of the Coastal Act because they operate to take private property for public use without payment of just compensation.

51. The Public Access Guidelines are invalid in that they contravene the Fifth and Fourteenth Amendments to the Constitution of the United States, are in excess of the Commission's jurisdiction and authority to promulgate, and contravene the provisions of the Coastal Act because they subject coastal development permit approval to terms, conditions, and dedication requirements which bear no reasonable, rational, or substantial relationship to the activity which government approval is required, thereby amounting to a violation of petitioners' due process rights.

BASIS FOR RELIEF

52. Respondent's decision on remand remains invalid under Code of Civil Procedure § 1094.5 in that the Commission exceeded its jurisdiction, denied petitioners a fair hearing, based its decision on invalid guidelines, and abused its discretion as set forth more fully below.

53. Respondent exceeded its jurisdiction by following its guidelines and placing an access condition on the approval of petitioners' permit, which condition is not authorized by the Coastal Act in that:

a. The access condition imposed is inconsistent with the need to protect the constitutional rights of private owners as expressly provided for in Public Resources Code §§ 30001.5 and 30210.

b. Respondent has exercised its power to grant or deny a permit in a manner which will take or damage private property for public use, without the payment of just compensation, contrary to the specific provisions of Public Resources Code § 30010.

c. Respondent proceeded in a manner contrary to the provisions of Public Resources Code § 30212 in that public access conditions are not authorized where adequate public access already exists nearby petitioners' property.

d. Respondent proceeded in a manner contrary to the provisions of Public Resources Code § 30212 in that said section authorizes access only in "new development projects." Petitioners' construction of a replacement single-family dwelling on the property is not a "new development project" under the Coastal Act.

e. Respondent has violated the explicit legislative directive set forth in Public Resources Code § 30214 to assure that public access policies are carried out in a reasonable manner which balances the public's right to access with the equities and rights of individual property owners.

f. Respondent has violated Public Resources Code § 30005.5 by going beyond its police power authority in requiring an exaction where petitioners are creating no burden or, alternatively, by requiring an exaction which bears no reasonable relationship to any asserted burden.

54. Respondent failed to grant petitioners a fair hearing and committed a prejudicial abuse of discretion in that

respondent failed to give petitioners a reasonable opportunity to be heard, or to examine or rebut Commission-solicited declarations and evidence, in violation of petitioners' rights of due process guaranteed by the Fifth and Fourteenth Amendments of the United States Constitution and article 1, section 7 of the California Constitution.

55. Respondent committed an abuse of discretion prejudicial to petitioners in that it failed to proceed in the manner required by law by placing an access condition on the approval of petitioners' permit, which condition is not authorized by the Coastal Act for the reasons stated in Paragraph No. 53 a through f above and incorporated by reference as if set forth fully herein.

56. Respondent committed an abuse of discretion prejudicial to petitioners in that it failed to proceed in the manner required by law by placing an access condition on the approval of petitioners' permit, which condition bears no reasonable relationship to any asserted burden created by the proposed home and constitutes a taking of private property for public use in violation of the Fifth and Fourteenth Amendments of the United States Constitution and article 1, section 19 of the California Constitution.

57. Respondent committed an abuse of discretion prejudicial to petitioners in that its decision to impose access conditions upon petitioners' permit is not supported by findings in that:

a. the findings fail to demonstrate "either immediate impact or verifiable, nonspeculative cumulative impact;"

b. the findings do not show that petitioners' replacement housing "will burden the public's otherwise available access to the beach;"

c. the findings made are speculative and unclear, and fail to adequately apprise petitioners or the Court of the true basis for respondent's action; and

d. the findings made are standardized findings transferred from the Commission's Public Access Guidelines and other applications rather than real findings based on evidence from this application.

58. Respondent committed an abuse of discretion prejudicial to petitioners in that the findings made in support of the imposition of the access condition are not supported by either the independent weight of the evidence or substantial evidence in light of the whole record in that:

a. the finding that replacing the house will intensify the use of the property is not supported by evidence and, in fact, is contradicted by evidence;

b. the finding that replacing the house with another house in the same location will discourage the public from visiting the shoreline because of physical proximity is not supported by evidence or common sense;

c. the finding that replacing the house will consume existing road capacity and off-street parking and further congest existing access roads and recreational areas is not supported by evidence and, in fact, is contradicted by evidence;

d. the finding that replacing the house will increase the use of the beach by residents and guests is not supported by evidence and, in fact, is contradicted by evidence;

e. the finding that petitioners' dry sand has been used by the public for access and passive recreation is not supported by evidence;

f. the finding that replacing the house will potentially adversely affect the use of the beach by many is not supported by evidence and, in fact, is contradicted by evidence; and

g. no supportable finding was made as to any reasonable relationship between the construction of a new dwelling on the property and the exaction of private property made by respondent.

59. Such action by respondent is arbitrary and capricious within the meaning of Government Code § 800 and, thus, petitioners may be awarded attorneys' fees under this section.

60. Respondent, Commission, has failed to set or hold a hearing on petitioners' permit application within 49 days after remand by this Court, when their application was pending before the Commission, in apparent violation of Public Resources Code § 30621. Petitioners have not waived their right to a timely hearing on remand.

61. At all times herein, respondent owed a duty to petitioners to perform its duties in accordance with the provisions of the Coastal Act and the California and Federal Constitutions and to adopt only such Public Access Guidelines as are authorized and consistent therewith.

62. Respondent, Commission, has promulgated Public Access Guidelines, described herein, in excess of its jurisdiction and without authority and thereby failed to perform its duties in accordance with applicable law.

63. Respondent, Commission, has implemented its Public Access Guidelines in excess of its jurisdiction and without authority and thereby failed to perform its duties in accordance with applicable law.

64. Petitioners have exhausted the available administrative remedies required to be pursued by them by complying with all rules, regulations, and statutes provided for under the Coastal Act (Pub. Res. Code §§ 30000 *et seq.*).

65. Petitioners do not have a plain, speedy, and adequate remedy in the ordinary course of law.

66. Petitioners are entitled to judicial review in this Court of the Commission's decision on remand, and may obtain such review by means of a supplemental petition for writ of mandate. *Giannini Controls Corp. v. Superior Court,* 240 Cal. App. 2d 142, 151, 156 (1966).

67. Unless respondent is compelled to perform its legal duties as prescribed by law, petitioners will be irreparably injured.

68. On or about June 1, 1983, and within 10 days of the Commission's decision on May 26, 1983, petitioners made a timely request to the California Coastal Commission for the preparation of the administrative record. As soon as possible, petitioners will obtain a copy and enter it into the record. At such time, petitioners, if necessary, will ask this Court for leave to amend their petition upon consideration of such record.

WHEREFORE, petitioners pray that:

1. a peremptory writ of mandate be issued directing respondent to delete the special access conditions from its approval of petitioners' permit and approve said permit without such conditions;

2. a peremptory writ of mandate be granted by this Court requiring and compelling respondent to:

a. set aside those portions of the Public Access Guidelines which nullify the statutory distinction between "new development projects" and "development" and require the dedication of private property for public use in projects that are other than new development projects and refrain from the enforcement of said complained of guideline provisions;

b. adhere to the duties as described by this Court; and

c. perform its statutory and constitutional duties in accordance with the Coastal Act of 1976, applicable state law, and the State and Federal Constitutions;

3. reasonable attorneys' fees be awarded under Government Code § 800, Code of Civil Procedure § 1021.5, and any other applicable law;

4. petitioners are to recover the costs of this action; and

5. other and further relief as the Court deems just and proper be awarded petitioners.

DATED: July 1, 1983.

Respectfully submitted,

RONALD A. ZUMBRUN
HAROLD J. HUGHES

/s/ By HAROLD J. HUGHES
Attorneys for Petitioners

VERIFICATION

I, James Patrick Nollan, am one of the petitioners in the above-entitled proceeding. I have read the foregoing petition and know the contents thereof. The above document is true of my own knowledge.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on July 8, 1983, at Los Angeles, California.

/s/ JAMES PATRICK NOLLAN

EXHIBIT A

PUBLIC ACCESS (SHORELINE)
INTERPRETATIVE GUIDELINES
(Adopted 2/20/80)

TABLE OF CONTENTS

I. INTRODUCTION—CONSTITUTIONAL PROVISIONS FOR PUBLIC ACCESS

II. WHAT PROJECTS ARE SUBJECT TO THE ACCESS POLICIES OF THE COASTAL ACT OF 1976?

A. "Development"

B. "New Development"

III. WHERE A PROJECT IS A "NEW DEVELOPMENT", WHAT PROVISIONS FOR PUBLIC ACCESS ARE REQUIRED TO FIND THE PROJECT CONSISTENT WITH THE ACT?

A. Lateral Access

1. Description of Lateral Accessway

a. Describing an accessway from a fixed inland point

b. Describing an accessway from the high water line

2. Additional provisions for public access to offset burdens of the proposed project on public access

3. Types of uses of an accessway

a. Pass and repass

b. Passive and recreational uses

c. Recreational uses

4. Privacy Buffer

B. Bluff Top Access

1. Description of the accessway
2. Appropriate Uses
3. Privacy Buffer

C. Vertical Access

1. Location of vertical accessways
2. Description of vertical accessways
3. Use of the accessway
4. Privacy Buffer

D. Exceptions of the requirement that access be provided in "new development"

1. Determining potential adverse impacts of public access on resources
2. Possible mitigation measures
3. What constitutes adequate access nearby

IV. HOW SHOULD DEDICATIONS OF PUBLIC ACCESSWAYS BE ACCOMPLISHED?

A. Deed Restrictions

B. Grant of Fee Interest

C. Grant of an Easement

D. Offers of Dedication

PUBLIC ACCESS
(SHORELINE)
(Adopted 2/20/80)

I. INTRODUCTION — CONSTITUTIONAL PROVISIONS FOR PUBLIC ACCESS

The California Coastal Act requires that public access to and along the shoreline be maximized. This legislative mandate stated in Section 30001:5(c), is consistent with the provisions of Article X Section 4 of the California Constitution which states:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for *any* public purpose . . . and the Legislature shall enact such law as will give the *most liberal construction* to this provision so that access to the navigable waters of this state shall *always be attainable* for the people thereof. (Emphasis Added)

In reviewing projects to determine consistency with the Coastal Act of 1976, the Coastal Commission is required under Section 30210 to carry out the Constitutional requirements for provision of public access to the navigable waters of the state by maximizing such access. The access policies of the Coastal Act should be read to give liberal interpretation to the Constitutional provision that access to the shoreline should "always be attainable." Section 30210 of the Coastal Act provides that:

> In carrying out the requirement of Section 4 of Article X of the California Constitution, *maximum* access, which shall be conspiciously posted, and recreational

> opportunities shall be provided for all the people consistent with public safety, and the need to protect public rights, rights of private property owners, and natural resource areas from over use. (Emphasis Added)

Additional provisions of Chapter 3 of the Coastal Act (Sections 30211-30214) set forth requirements for the provision of public access which must be met in order for the Commission to find a project consistent with the provisions and policies of the Act. The following guidelines have been prepared to explain the public access provisions of the Act. These guidelines indicate when the public access provisions are applicable to a given project and the type (vertical and lateral) and amount (including area and appropriate uses) of access which should be provided.

II. WHICH PROJECTS ARE SUBJECT TO THE ACCESS POLICIES OF THE COASTAL ACT OF 1976?

All projects requiring a Coastal Development Permit must comply with the public access provisions of Chapter 3 of the Coastal Act of 1976. In addition to setting forth the Constitutional provision mandating that access to the public tidelands be maximized (Section 30210), Sections 30211 and 30212 provide specific requirements to be met prior to finding a project consistent with the access provisions of the Coastal Act.

A. *"Development"*

Section 30211 of the Act provides that:

> *Development* shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation. (Emphasis Added)

This section applies to *all* projects falling within the definition of development set forth in Section 30106 of the Act, which states:

> Development means, on land, or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or of any gaseous, liquid, solid, or thermal waste; change in density or intensity of use of land, including but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water; or access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private or public or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes; kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511. As used in this section "structure" includes, but is not limited to, any building, road, pipe, flume, conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

To meet the provisions of Section 30211 of the Act, development as defined above cannot interfere with the public right to use the sea where acquired through *historical use* or *legislative authorization*. Public prescriptive rights must, therefore, be protected wherever they exist. Where there is evidence of historic public use which has been documented through photographs or statements by users of the shoreline area, and where a proposed development

could interfere with the asserted historic use, the Commission should protect the possible prescriptive rights. Such rights can be preserved through recordation of access agreements acknowledging the existence of public rights on the site or by siting and designing the proposed development in a manner which does not interfere with the public rights. The actions taken by the Commission should not diminish the potential prescriptive rights in any way. The Commission may, nowever, allow development to be sited in an area of historic public use where equivalent areas for public access are provided; such compromise dedication areas should provide for equivalent area and use of the accessways.

Where appropriate, the Commission should investigate the factual basis of the prescriptive rights claim and include, in the permit file, any information available to document the historic public use of the subject site. Photographs of the site showing public use and affidavits of those claiming to have used the area in question should be included. The Commission, upon compiling such preliminary data, should request the Attorney General's office to advise the Commission on what actions, such as litigation to quiet title in the public, should be taken.

Evidence of prescriptive use also indicates the need for dedication areas required under Section 30212 of the Act. Requiring dedications of historic use areas under Section 30212 would protect any public rights while avoiding public and private litigation costs over the issue of prescriptive rights in a quiet title action.

B. *"New Development"*

Section 30212(a) of the Coastal Act provides that:

> Public access from the nearest public roadway to the shoreline and along the coast shall be provided in *new development* projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

A review of the history of development along the California coastline and the regulatory process relating to that development makes the basis for this access requirement clear. The public vote enacting the California Coastal Zone Conservation Act of 1972 constituted a clear legislative finding that unregulated development was individually and cumulatively precluding public access to the state owned tidelands. Under the 1972 Coastal Act, all permits as appropriate were therefore conditioned to require the provision of public access. The predecessor Commission's permit experience (e.g., Sea Drift, Doheny State Park, Del Mar Hotel, Venice Bikeway, etc.) and its planning experience (See Coastal Plan, pages 152-158) also confirmed that private development on the shoreline caused adverse impacts on the use of the state owned tidelands by the general public.

In adopting the Coastal Plan, the Commission found:

> "Along the immediate shoreline, homes, businesses, and industries have often cut off existing public access to the coastline, have used up available road capacity and off-street parking, and have precluded use of the

> coastline area for recreation. Development back from the shoreline also affect the ability of residents and tourists to get to and use the coast. In addition to its impact on transportation systems serving the coast, development can reduce upland recreation opportunities that would otherwise relieve demand on the shoreline."

The Commission therefore recommended that private development be regulated to assure that such development does not either directly or indirectly preclude public access to the shoreline.

The language of Public Resources Code Section 30212 makes clear that the Legislature concurred with the Commission's view, and concluded that all new development resulting in any intensification of land use generates sufficient burdens on public access to require access conditions in conjunction with that development. The basis for the public access requirements of the Coastal Act can be readily discerned by analyzing the exceptions set forth in Section 30212(a)(1-3). In those exceptions, the Legislature has weighed the public policy issues involved, by defining situations where public access *itself* would be inappropriate, rather than focusing on the nature of the proposed development. For example, the exceptions for public safety and military security is a self-evident statement that access is not appropriate where personal harm to individual members of the public or the public as a whole, in the form of impaired military security, would result. Similarly, the exceptions indicate that public access requirements are not appropriate where access would adversely affect natural resources of a statewide interest (i.e, fragile coastal resources and agriculture). Each of these exceptions

focuses, however, on the appropriateness of access itself, rather than on any burdens which might be generated by particular types of development. In other words, Section 30212 of the Coastal Act indicates that all new development generates access burdens and that the only situations where access is not required are where access itself would be inappropriate for public policy reasons.

Similarly, Section 30212(a)(2) required the provisions of public access "unless adequate access exists nearby." As with other exceptions noted previously this subsection of PRC 30212 assumes that public access is required and states that one of the factors to be considered in determining the appropriateness of access is the need for access. The factors that are to be assessed in determining access needs can be better understood by reviewing the potential impacts of development on access.

Private development imposes an impediment to or burden on the public's ability to gain access to or along the shoreline, either incrementally or cumulatively in the following ways: (1) physically precluding public access; (2) discourages them from visiting the shoreline in the first place because of physical proximity of development: (3) creates use conflicts in which landowners harass and intimidate the public and seek to prevent them from using tidelands based on disputes over the exact boundary between private and public ownership; (4) takes up existing road capacity and off-street parking thereby making it more difficult to gain access to and use of the coast by further congesting existing access roads and recreational areas: (5) increasing the intensity of use of beach and

upland areas thereby congesting currently available support facilities; and (6) creating impediments to public access by placing structures along the shoreline (e.g. sea walls) that impede access or that alter shoreline processes thereby affecting the amount of beach available and even the location of the mean high tide line. In assessing the need for access, the Commisison must also consider that the burdens generated by new devolopment, in conjunction with tidal and storm conditions can create physical barriers to safe public access absent the provisions of new public accessways. Recognizing these potential impacts of development, the Legislature has thus focused the application of Section 30212 on the appropriateness (i.e. need) of access rather than on the type of development proposed.

In assessing needs, the Legislature has stated a requirement for both vertical and lateral access ("to the shoreline and along the coast"). Vertical access can generally be spaced in response to needs, as determined by present and projected usage, support services and physical constraints. Based upon the considerations, vertical accessways generally should be spaced much closer together in urban areas than in rural areas. Lateral access serves basically two functions in terms of need: (1) the provision of lateral access can minimize the number of vertical accessways required, thereby reducing maintenance costs and limiting use conflicts with private development, that would otherwise be required to guarantee public access to all the tidelands and (2) the provision of lateral access recognizes the potential for conflicts between public and private use and creates a type of access that allows the public to move freely along all the tidelands in an area that can be clearly delineated and distinguished from private

use areas (e.g. a 25 ft. area of dry sand beach at all times). Thus the "need" determination set forth in PRC 30212 (a) (2) should be measured in terms of providing access that buffers public access to the tidelands from the burdens generated on access by private development.

The Legislature has recently enacted criteria to be considered in establishing access requirements that related to the "time, place and manner of public access . . . " (PRC 30214). These criteria provide the basis for determining the type and extent of any special condition for access requirements under Section 30212. As in the case of the Section 30212(a) tests, the criteria set forth in Section 30214 focus on the appropriateness of access itself ("time, place and manner") and not on the particular impact of any proposed development. In every permit action, the commissions must therefore consider the criteria specified in Section 30214 and make findings where such criteria are applicable. These criteria focus on the physical aspects of the areas under consideration and on the type of access appropriate to the fragility of natural resources and the nature of development in the vicinity. The criteria also focus on the management aspects of providing public access.

Thus, based on the historical evidence that development along the California coast results in many different ways in the preclusion of public use of the state-owned tidelands, based on the same conclusions by the Commission in adopting the Coastal Plan, and based upon the legislative expressions in both the 1972 and 1976 Coastal Acts, the Commission concludes that all new development projects cause a sufficient burden on public access to warrant the

imposition of access conditions as a condition to development, subject only to the exceptions specified by the Legislature. A finding of consistency with the public access policies of the Coastal Act accordingly can be made only if there is sufficient provisions for mitigating the burdens on impacts which the Legislature has found to be inherent in new development projects; unless one of the three stated exceptions is applicable, all new development located between the first public roadway and the shoreline must provide public access. Section 30212(a) and 30214 of the Act set the framework for determining when access is required and under what conditions. Section 30212(a) states where access is required—in developments located between the first public road and shoreline and both to and along the coast—and establishing the three categories where access is not required. Section 30214 established criteria to be considered when determining the "time, place and manner" of providing public access.

Under the previous Access Guidelines (dated July 31, 1979), the Commission indicated that certain types of developments, as defined by PRC 30106, do not create an intensification of use, do not create access conflicts and therefore should not be treated as "new development" subject to the Act's access requirements. These categories of activity, along with a category including demolition and reconstruction, have been codified by the Legislature in Section 30212 (b) of the Act. The categories which by Statute are not "new development are:

(1). *Structures Destroyed by Natural Disaster.* Replacement of any structure pursuant to the provisions of subsection (g) of Section 30610.

(2). *Demolition and Reconstruction.* The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3). *Improvements.* Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height or bulk of the structure by more than 10 percent, which do not block or impede access, and which do not result in a seaward encroachment by the structure.

(4). *Repair and Maintenance.* Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610 that a coastal development permit will be required unless the regional commission or the commission determines that such activity will have an adverse impact on lateral public access along the beach.

For purposes of Section 30212, "project" must be interpreted to mean any activity constituting "new development" as defined above.

In examining new Section 30212(b), it is clear that the types of development that are not to be considered "new development" have similar characteristics. Under Section 302123(b) (1), a replacement of a structure is conditioned so that the structure must be re-built in the same location. Section 30212(b) (2) similarly conditions the location of "demolition and reconstruction" projects to the same location and a bulk increase of no more than 10%. Improvements under Section 30212(b)(3) are subject to certain spatial and size limitations, and are further limited to

those activities "which do not block or impede access, and which do not result in a seaward encroachment by the structure." Likewise, repair and maintenance activities are not exempt from the requirements of Section 30212(a) if "such activity will have an adverse impact on lateral public access along the beach." Thus, none of the categories of development exempted from the requirements of Section 30212(a) allow any increase in intensity of use of any physical construction that has the potential for limiting or impinging upon public access.

Subdivision (b) of Section 30212 codifies the Commission's historical experience, and enumerates the only categories of "development" which have previously been recognized as not allowing potential access impacts. The Commission recognises, however, that there may be additional classes of "development" which do not result in any intensification of use and do not physically impinge upon public access; if any such classes are factually documented, the Commission will include them in the Guidelines as not "new development" for purposes of PRC 30212(a).

III. WHERE PROJECT IS A *"NEW DEVELOPMENT"*, WHAT PROVISIONS FOR PUBLIC ACCESS ARE REQUIRED TO FIND THE PROJECT CONSISTENT WITH THE ACT?

A. *Lateral Access.*

Lateral access dedications provide for public access and use along the shoreline. A 25-ft. wide accessway along the dry sandy beach for passive recreational use by the public has been found sufficient to offset the burden new development projects generally impose on public access

(see previous discussion on New Development). This 25-ft. wide minimum has been established as the necessary width to allow reasonable use by the public of the state-owned tidelands. In some instances this may be reduced to protect adjacent resources or to protect the privacy rights of adjacent property owners (see discussion on privacy buffer). However, where the proposed project would, either by itself or in conjunction with others similarly situated, impose unusual burdens on the public's ability to use the shoreline, at the present time or in the future, additional area for public access and public use of the shoreline may be required to balance the benefit to the additional burden imposed on the public's constitutionally protected right of public access resulting from the project. The mechanisms and amount of public access noted in these guidelines as being necessary to meet the mandates of the Coastal Act, represent provisions which the Commission believes are reasonable conditions to fulfill the public access policies of the Coastal Act, specifically, Section 301210-30214.

1. *Description of Lateral Accessway.* The description of an accessway should provide the public and the property owner the maximum amount of certainty possible to determine where public rights of access exist. Descriptions of accessways should be made in one of the two manners detailed below. The first is to define the accessway as extending from a fixed inland point seaward to the seaward property line (the mean high tide line). The area included in this accessway would remain constant although the "useable area" of dry sand beach would fluctuate with the changes in the tide. The second mechanism for describing a lateral accessway is to set the width of the useable beach

required (e.g. 25 ft.) and have this use area extend inland from the high water line. Under this latter approach the exact location of the accessway would fluctuate daily with the change in tides although the width of the accessway would remain constant. These two approaches are described as follows:

a. *Describing an Accessway From a Fixed Inland Point.* The most efficient way to describe an accessway is as a distance from a fixed line landward of and parallel to the mean high tide line and extending seaward to the seaward property line (mean high tide line). When this description is used, the area of dry sand beach may vary from wide areas of sandy beach available for public uses during the low tide conditions, to vary narrow stretches of sandy beach resulting in little area for public use during high tide or storms. To account for the potential changes in the waterline, the area included in the accessway should be sufficient to assure that the public will have the ability to use some dry sandy beach *at all times of the year*. Because the landward boundary of this accessway is fixed, the landowners/residents of the beachfront parcels, are afforded a greater degree of certainty of where public rights exist than that additional beach area may be required to protect the public's right of access to and along the shoreline. The public also benefits from this approach, since the public and the accepting agency can more readily determine where public rights exist. However, the public trade off for this certainty is that during storms and high tides, the accessways designated may be entirely submerged.

To determine the point at which such an accessway should begin the Commission should consider the variations in the high water line during the year, the

topography of the site, the location of other lateral accessways on neighboring lands and the privacy needs of the property owner. Any such fixed point should, however, give the greatest amount of assurance that the public would retain the right of access and use along the shoreline during the majority of the year.

b. *Describing an Accessway From the High Water Line.* Where the Commission determines that it would be difficult to find a fixed inland line which would assure public access throughout the year and still grant the resident a privacy buffer (See Privacy Buffer discussion below) or where contiguous accessways are measured from the high water line, a lateral accessway may be described as beginning at the seaward property line (the mean high tide line) and extending landward a specified distance from the daily high water line. An accessway described in this manner would provide an area of a standard width for public access; the precise location of such an accessway would fluctuate with the tide. The width of such an access area should be determined by the Commission in light of the Constitutional right to get to and along the shoreline, the need to offset any burdens the proposed development may have on the public's right of access along the shoreline, and the need to protect the right of privacy of the adjacent residents.

This method of defining the accessway assures the public a specified amount of access at all times of the year while requiring the applicant/landowner to dedicate only a limited amount of land for the provision of public access. However, as a trade-off for public assurance that some access would be available at all times of the year and the private benefit of only a limited amount of beach area required to be dedicated, neither the landowner/resident nor the public is afforded certainty as to where the public rights will be located in the future. This uncertainty may place an equal burden on the resident's ability to regulate the

area not subject to the rights of public access since this area also fluctuates with the tide and the accepting agency/association's ability to establish an effective maintenance program for these access areas.

For the purpose of these guidelines, the daily high water line is defined as a line running parallel to the shore and marks the boundary between the wet and dry sand.

2. *Additional provisions for public access to offset burdens of the proposed project on public access.* As noted previously, in accordance with provisions of Article X Section 4 of the California Constitution, Sections 30210 of the Coastal Act requires that public access to and along the shoreline be maximized. Although in many situations a 25 ft. accessway or its equivalent for passive recreational use of the shoreline is sufficient to preserve the public right of access, there are projects whose burdens on public access may not be successfully mitigated with an accessway of this nature. In such circumstances, additional area for public access may be required.

In an application for a permit to construct a seawall, for example, an additional beach area generally up to the foot of the wall is required to be granted for public access and use to offset the burdens on access that will result from the construction of the retaining device.

The burden on public access by such devices stems from the impacts of seawalls in the availability of sandy beach. Shoreline protective devices, particularly vertical seawalls, have serious adverse effects on coastal resources. Such seawalls increase scour from their base and, thus, decrease the area of useable beaches. Also, because shoreline protective devices are intended to halt the landward progress

of erosion, they tend to define the shoreline in areas subject to erosion. As such, they tend to limit public passage on beaches especially at high tides and storm conditions. Further, construction of shoreline protection devices eliminates dune materials as a source of beach sand, and further limits the ability of the shoreline to migrate as it would in a natural state. Given these additional direct burdens on the availability of sandy beach and the resultant impacts on public access to the state-owned tidelands, it is only with additional provisions for public access that this burden can be sufficiently mitigated and thus that construction of such devices can be found consistent with Section 30212 of the Coastal Act [see, Inman, Douglas. Summary Report of Man's Impacts on California Coastal Zone, State of California. The Resources Agency, Department of Navigation and Ocean Development, November 1976, page 30. U.S. Army Corps of Engineers, Shoreline Protection Manual.]

In addition, where construction on parcels which historically have been subject to large amounts of public use, or, proposals to construct on parcels where cumulative impacts of buildout would result in limiting public access due to overcrowding of major coastal access roads (e.g. Highway 1, Pacific Coast Highway, Carmel Valley Road) or due to overcrowding of existing public beach areas, the applicant may also be required to dedicate additional accessways or areas for support services (e.g. parking areas) to balance the burdens to the public with the benefit to the applicant. Such additional dedications may also be required to find development consistent with the provisions

of Section 30252 of the Coastal Act which provides, in part, that:

> The location and amount of new development should maintain and enhance public access to the coast by (1) facilitating the provision or extension of transit service, (2) providing commercial facilities within or adjoining residential development or in other areas that will minimize the use of coastal access roads, (3) providing non-automobile circulation within the development, (4) providing adequate parking facilities or providing substitute means of serving the development with public transportation, (5) assuring the potential for public transit for high-intensity uses such as high-rise office buildings, and by (6) assuring that the recreational needs of new residents will not overload nearby coastal recreation areas by correlating the amount of development with local park acquisition and development plans with the provision of on-site recreational facilities to serve the new development.

In considering the potential impacts a new development may have on public access, the Commission should review the proposals in light of the Coastal Act provisions which give priority to specific types of development on oceanfront parcels. Sections 30221 and 30222 of the Act provide that:

> Oceanfront land suitable for recreational use shall be protected for recreational use and development unless present and foreseeable future demand for public or commercial recreational activities that could be accommodated on the property is already adequately provided for in the area. (30221)

> The use of private lands suitable for visitor-serving commercial recreational facilities designed to enhance public opportunities for coastal recreation shall have priority over private residential, general industrial, or general commercial development, but not over agriculture or coastal dependent industry.

The commitment of oceanfront lands to a non-priority use stipulated in the above quoted Sections of the Coastal Act may burden the future needs of the public by precommitment of coastal land suitable for visitor serving development to totally private use (e.g. residential developments). If potential public or commercial recreation areas are developed for non-recreational use, existing recreational areas will have to absorb the demand created by population increase or increases in leisure time that could otherwise have been absorbed by the parcel in question; moreover a parcel committed to new residential development will itself generate additional recreational demands. To offset the potential burden resulting from its commitment of such lands prior to the certification of a local coastal program which addresses the public access needs of the community, additional areas for public access or a wider range of uses allowed on the accessway provided may be required to balance the burden to the public with the benefit the applicant derives from proceeding with a non-priority development prior to completion of the planning process.

3. *Types of uses of an accessway.* In accord with Section 30214 of the Act, in determining the amount and types of uses appropriate for a given accessway, consideration should be given to the protection of habitat values of the site, topographic constraints of the site, the recreational needs of the public and the privacy rights of the landowner. Restrictions on uses of accessways dedicated in accordance with permit conditions may be imposed by the accepting agency/association with the approval of the Executive Director to provide for more effective maintenance of the accessway. Example of use limitations are:

a. *Pass and repass.* Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the accessway may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner.

b. *Passive and recreational uses.* Passive recreational uses include those activities normally associated with beach use (e.g. walking, swimming, jogging, sunbathing, fishing, surfing). This *does not include* use of the accessway for organized sports activities, campfires, or vehicular access for other than emergency or maintenance purposes. Most accessways required to meet the provisions of Section 30212 of the Coastal Act should provide for at least this range of uses unless the topographic constraints, habitat values, or privacy needs warrant more restrictive provisions on the use of the accessway. More restrictive uses such as limitations in hours or restrictions on use during specific seasons in order to protect habitat values may be included where such site specific impacts have been identified.

c. *Active recreational uses.* Recreational uses include the full range of beach oriented activities. This type of use of a given accessway may be required where the

burdens of the proposed projects would severely impact public recreational use of the shoreline, where the proposed development is not one of the priority uses specified in Section 30222, where the uses reflect the historic public use of the parcel (see prior discussion on prescriptive rights), where the uses allowed would be consistent with the use of the proposed project (e.g. where the proposed development is for a commercial or visitor serving facility or a large subdivision where the beach area is proposed as a recreation center for the subdivision, etc.), and where such uses would not significantly interfere with the privacy of the landowner (e.g. where the project is sited on a bluff above the accessway, or where the project is physically separated from the accessway by dunes, or a retaining device, etc.). The accepting agency/association with the concurrence of the Executive Director may restrict some of these uses to facilitate maintenance on these accessways.

4. *Privacy Buffer.* In determining the specific siting of an accessway, the protection of the right of privacy of the adjacent landower should be considered. Where a residential structure is located on the beach with no physical barrier such as a seawall separating the residential structure from the accessway. the accessway should not extend any closer than 10 feet to the occupied residential structure. The range of uses within the area from 10 to 20 feet from the occupied structure may additionally be limited where the Commission determines that this is necessary to protect the privacy of the residents. In such cases, the area from 10 to 20 feet from the residential structure may be used for pass and repass with all areas seaward of the 20 ft. line available for passive recreational use. In determining an appropriate access buffer, the need for privacy should be considered in light of the public right to obtain access and use along the shoreline;

the buffer area should not act to preclude the public right of access to and use of the publically owned tidelands. New development should be sited a sufficient distance landward from the oceanfront to assure that the public's right of access and use of the access easement is protected. Thus, with appropriate siting limiting the encroachment of structures seaward, both the public's right of access and the residents right to privacy can be protected.

B. *Bluff Top Access.*

Where no beach area exists and a project is proposed along a shorefront bluff top lot, public access for public viewing of the shoreline rather than for access along the shoreline may be required to find the project consistent with the access provisions of Section 30212 as well as Section 30251 of the Coastal Act which provides that:

> The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited and designed to protect views to and along the ocean and scenic coastal areas, minimize the alteration of natural landforms, to be visually compatible with the character of surrounding areas, and, where feasible, to restore and enhance visual quality in visually degraded areas. New development in highly scenic areas such as those designated in the California Coastline Preservation and Recreational Plan prepared by the Department of Parks and Recreation and by local government shall be subordinate to the character of its setting. (Emphasis Added)

Such accessways should run along the edge of the bluff and be of a width adequate to provide safe public access

along the bluff edge of the property. In reviewing the need for such accessways to grant the public the ability to enjoy the publically owned tidelands, the Commission should consider:

a. Public safty constraints of the site, including but not limited to the stability of the bluff edge on which the accessway would be located; and

b. Habitat values and agricultural uses which may be adversely impacted by such access and any mitigation measures, which may be used to provide access consistent with the protection of such habitat values and agricultural uses such as restrictions on the number of persons using the accessways and seasons of the year during which access may be appropriate; and

c. Privacy rights of the subject landowner and any mitigating measures which may be implemented to offset burdens the access may have on privacy, such as the use of a buffer area between residential structures and the accessway.

Where the Commission determines that bluff top access is appropriate and required under the provisions of the Coastal Act, the considerations set forth in the previous discussion of lateral access provisions may be applicable to the bluff top accessway conditions.

1. *Description of the accessway.* The bluff top view area should be described as an area beginning at the current bluff edge extending approximately 25 feet inland (the width of the accessway may be increased to provide for areas where heavy public use is anticipated or where use in addition to pedestrian access is proposed). Because

of the potential for erosion of the bluff edge, the easement shall be allowed to be adjusted inland to the current bluff edge as the edge recedes. However, the easement should not extend any closer than 10 feet from an occupied residential structure to assure an adequate privacy buffer for the residents. The easement area should be legally described with the furthest inland extent of the easement possible referenced (i.e. beginning of the buffer area as a distance from a fixed monument (e.g. center-line of a public road).

2. *Appropriate Uses.* The use of bluff top accessways should be limited to pedestrian access and coastal viewing purposes. Where the accessway is included in a section of a coastal bicycle trail system, the use of the accessway may provide for bicycle access if such use is consistent with the public safety and the protection of resource values of the site. Any additional proposed uses of bluff top accessways should be reviewed in light of the specified needs of the area and the constraints existing on the project site.

3. *Privacy Buffer.* Where a residential structure exists on the project site or where the proposed project is for the construction of a residential structure, the accessway should be sited and designed to provide a buffer area between the accessway and the residential structure. Generally, a 10 ft. buffer between the accessway and the structure will protect the residents right to privacy where the accessway is for pedestrian use. Where additional uses for the access area are proposed, additional buffer area may be provided to offset the impacts that the additional uses, such as bicycle traffic may have on the residential use of the structure.

C. *Vertical Access.*

Verticle access dedications are required to provide access from the first public roadway to the shoreline. New development proposed on sites located between the first public road and the sea may be required to provide vertical access under the mandates of Section 30212 of the Coastal Act. In determining where vertical access should be required, the Commission should consider, the nature of the burden on public access created by the project (see previous discussion on new development), the public need to gain access to the shoreline in a given area, the physical constraints of the site including but not limited to, safety hazards, existence of fragile coastal resources and current agricultural uses, the location of support facilities such as parking areas, and the privacy needs of the residents of the project site.

1. *Location of vertical accessways.* The location of vertical accessways shall reflect the rights of the public to reach the shoreline in specified areas and the need to protect specific coastal resources as set forth in Section 30212 of the Act. 80% of the population of the State of California lives within a two hour driving distance from the shore, with the majority of this population centered in the major metropolitan areas. In considering the siting and location of vertical accessways, the Commission should consider the areas which would be most heavily used in light of the proximity of the accessway to the major urban centers. Additional vertical accessways should be provided at frequent intervals, where the Commission determines that public use will be heaviest. The increased number of vertical accessways may be required to avoid

over use of individual areas by distributing the public use to areas where support facilities can accommodate it. In rural areas, accessways may be sited at less frequency reflecting the lower intensity use of the areas due to the distance of the accessways from urban areas. In considering the need for vertical accessways in both urban and rural areas, the Commission should also consider the need to site accessways where the least amount of improvements would be required to make the access point useable by the public, where pocket beaches exist and alternative access to the shoreline would not be available, where support facilities exist or can be provided, and where the access corridor would have the least amount of impacts on the natural land forms in the area. In addition to vertical access across the project sites, access along existing private roads may be required to fulfill the access provisions of the Act.

Vertical access may be inappropriate on some sites where such access would have an adverse impact on fragile coastal resources and on existing agricultural operations as stated in Section 30212 of the Act. Limited forms of access may, however, be provided consistent with the protection of these resources. For example, it may be appropriate to restrict the location of vertical accessways to avoided interfering with agricultural activities and bisecting agricultural parcels, to limit the times of year the accessway is open to public use to avoid conflict with nesting seasons or other seasonal habitat values, and to institute a maintenance and monitoring program to assess the impacts of public use and proposed additional limitations on use to protect existing resources.

2. *Description of vertical accessways.* The vertical accessway should usually be sited along the borders of the project site and should extend from the road to the shoreline (or bluff edge if access is required to reach a bluff top viewing area). Where a different siting of the accessway would be more appropriate considering the topography of the site and the design of the proposed project. the accessway may be resited (e.g., along a walkway through a commercial development or along a roadway in a proposed subdivision).

A vertical accessway should be a minimum of 10 feet in width to allow for public pedestrian use of the corridor. This width may be adjusted to meet the needs of the proposed accepting agency/association. In considering the width of the vertical accessway, additional area needed for the placement of improvements should be taken into account (e.g., the need to construct stairs). Where the accessway will be used for other than pedestrian access, additional area may be required to accommodate these needs.

Where an accessway provision over private roads is required, the length of the accessway and the area of the road proposed for public use should be specifically described. The use of the road should be guaranteed by a recorded easement and should extend to a specific access point at the shoreline. The width of the accessway should be determined by the types of uses proposed (i.e., vehicular access, pedestrian access).

3. *Use of the accessways.* The use of a vertical accessway along the boundary of a project site is usually limited to the public's right to pass and repass. Additional uses.

such as access for bicycles, may be provided where determined that such use is appropriate. Where access along a private road is required vehicular use as well as pedestrian access may be required. In determining whether vehicular access should be provided, the distance from the entrance to the beach area and the availability of parking at the point of access to the shoreline should be considered.

4. *Privacy Buffer.* Where a vertical accessway for pedestrian use is sited on a parcel where a residential structure exists or is proposed for construction in the proposed project, the accessway should not be sited any closer than 5 feet to the residential structure. This 5 foot buffer will be provided to protect the privacy rights of the residents of the site. In some instances, resiting of the proposed project may be required to provided the needed access corridor and still allow for a buffer between the accessway and the residential structure.

D. *Exceptions of the requirement that access be provided in "new development".*

As discussed previously, public access to and along the shoreline must be provided in "new development" projects located between the first public roadway and the sea. Section 30212 of the Coastal Act provides that following exceptions to that requirement:

1. It is inconsistent with the public safety, military security needs, or the protection of fragile coastal resources;
2. Adequate access exists nearby; or
3. Agriculture would be adversely affected.

In some instances by limiting the amount, type or hours of use of an accessway, public access may be provided consistent with public safety and protection of agriculture and fragile resources. Where it is impossible to provide any amount of public access without adversely affecting agriculture or fragile coastal resources or jeopardizing public safety or security needs, or if adequate access exists nearby, no provision for public accessways is required to find the project consistent with Section 30212 of the Coastal Act.

1. *Determining potential adverse impacts of public access on resources.* Potential impacts of public access on fragile coastal resources and agricultural uses existing on a site should be determined by balancing the need for public use with the potential additional private use of the accessways which will result, both individually and cumulatively, from approval of the proposed project. For example if a parcel is proposed for subdivision into 100 single family residential lots, impacts of public use on coastal resources should be reviewed in light of the use inherently generated by the private development being approved.

2. *Possible mitigation measures.* Where fragile coastal resources exist on the site or where the site is currently used for agricultural purposes, and if full public access would have an adverse impact on such resources on such use, limitations on public use should be imposed to allow for public access consistent with the protection of the values of the site. Restrictions on the seasons during which public access would be allowed and the number of persons using the accessways may be imposed to mitigate

impacts on the access on the fragile resources (e.g. restricting access during nesting seasons of endangered species; restricting the amount of vertical accessways thereby limiting the use of beaches with fragile resource values). In some instances, closely monitored access for scientific research by organized study groups may be allowed where less restrictive access would be detrimental to the protection of the resources of the site.

Where a proposed accessway would have a potential conflict with agricultural uses, limited public uses such as those noted for the protection of fragile resources may be required. Generally conflicts with agricultural uses arise from the siting of vertical accessways. In such cases, restricting such accessways to roadways and limiting use during seasons where the access would not interfere with the agricultural operations may be required to provide access consistent with Section 30212. Accessways shall not create the potential for vandalism or limit agricultural practices such as spraying.

3. *What constitutes adequate access nearby?*

Although the question of whether adequate access exists nearby applies to the siting of both lateral and vertical access, the Commission has generally found that existing access along the shoreline is not adequate to serve the public needs as related to the burdens on public access imposed by new development projects due to the uniqueness of each stretch of shoreline, the need to define the area of public use due to conflicts between the use by the public and private property owners, the fact that high tides and storms often impede the public's use of the state

owned tidelands due to the inability to pass along the shoreline making each link important to assure that access to all stretches of the state owned tidelands is provided, and that the need to provide sufficient area to assure access to and along the shoreline (Section 30212) for all beach visitors without over loading any single beach area. lateral access is generally required along all stretches of sandy beach.

As discussed previously, the adequacy of available vertical access is determined by the amount of public use of the area, availability of support services, location of pocket beaches, etc.; for a more complete discussion, see discussion on siting of vertical accessways.

IV. HOW SHOULD DEDICATIONS OF PUBLIC ACCESS BE ACCOMPLISHED?

Provisions for public access should be made in one of three forms: (1) deed restrictions; (2) grant of a fee interest in the accessway; or (3) offer to dedication of grant of an access easement. The proposed use of the accessway as well as the type of project proposed should be considered in determining the appropriate mechanism for dedication of the accessway for public use.

A. *Deed Restrictions.*

In contrast to the other two mechanisms for providing public access, deed restrictions do not grant any interest in the land proposed for public access. The landowner retains all responsibility for the accessway. Deed restrictions may be appropriate in limited situations to assure that public use of a specific area is not precluded by

subsequent actions of the landowner. For example, where access is required in a large residential development and the accessways will be used most often by residents of the project, the homeowners association may retain all property interest in the accessways but must allow the public the right of use. This requires the association to continue with the maintenance responsibilities associated with the operations of the accessways. Deed restrictions may also be used to assure continued public access in commercial facilities. This is generally appropriate since, for security needs of the facility, maintenance of the accessways are most effectively handled by the owner/operator of the commercial development. Deed restrictions should generally not be used for small parcels or for accessways that will require public maintenance.

B. *Grant of Fee Interest.*

In some instances, the applicant may be required to grant a portion of the property itself for public access. This is generally limited, however, to situations where the parcel is important in and of itself for access needs. The size and scope of the proposed project should be considered in determining whether the grant of a fee interest in the accessway is necessary to find the project consistent with the public access provisions of the Coastal Act. As with the grant of an easement, an agency or association approved by the Commission must accept the grant prior to its being effective. Because of time delays in obtaining an accepting agency and processing the acceptance of a grant of both fee interests and easements, offers to dedicate such interests (as described below) should be required rather than an outright grant.

C. *Grant of an easement.*

An access easement allows the public to use the accessway in accordance with the terms and conditions set forth in the grant of the easement. This right to use does constitute an enforceable interest in the land invested in the accepting agency/association. The owner of the parcel retains the ownership of the land subject to the public's interest in the area covered by the easement. Since the rights of the public are bound by the terms of the easement, the area covered by the easement and the appropriate uses must be specifically set forth in the documents conveying the interest to the accepting agency/association. Easements must be accepted by an agency or association acceptable to the Commission prior to being effective. As with the grant of a fee interest because of the time delays in accepting any interest in land, offers of dedication should be used to accomplish the conveyance.

D. *Offers of Dedication.*

Rather than requiring an outright dedication of a fee interest or an easement over the accessway, the Commission should require the execution of an offer to dedicate the appropriate interest. This offer, which must be recorded, can then be accepted by the appropriate agency within a significant amount of time. This mechanism assures that the appropriate interest is available for acceptance but does not impose the burden on the applicant of holding up construction of an approved project while an accepting agency is found and paper work is processed. Offers to dedicate should be irrevocable for a period not in excess of 21 years to maximize the options available to potential accepting agencies to assess the

current and future need for such accessways. Until the offer is accepted, *or unless the landowner consents,* the public has no rights to use the proposed accessways unless other public rights exist in the proposed accessway.

Adopted February 20, 1980

EXHIBIT B

Lot 59 of Faria Beach Colony Tract in the County of Ventura, State of California as shown on the map filed in Book 36, Page 27 of Record of Survey in the Office of the County Recorder of said county.

EXHIBIT E

DEED RESTRICTION

WHEREAS, the Faria Beach Trust is the record owner of the Faria Rincon Beach Colony of Ventura County; .....
are the beneficiaries under the Trust Agreement dated May 27, 1981;

AND WHEREAS, such Trust Agreement covers the premises legally described as Lot 59 of Faria Rincon Beach Colony as per map thereof recorded September 29, 1967, in Book 3, Page 27, of Records of Survey in the Office of the County Recorder of Ventura County, California;

AND WHEREAS, the above-referenced beneficiaries have filed an application with the California Coastal Commission to obtain a coastal development permit;

AND WHEREAS, under the regulations of the California Coastal Commission, the legal owners of the property must join as coapplicants;

AND WHEREAS, Coastal Development Permit No. ..... (Permit) was granted on .....
by the California Coastal Commission pursuant to the California Coastal Act of 1976, and said Permit was subject to the following conditions:

1. liability waiver;
2. grant of public access by deed restriction; and
3. public rights;

AND WHEREAS, the real property described above is located between the first public road and shoreline;

AND WHEREAS, the applicants and permit holders above-named may not undertake the development requested in Coastal Development Permit No. ..... until the coastal development permit has been issued;

AND WHEREAS, the applicants and permit holders under this Deed Restriction have elected for themselves, their successors, and assigns to execute this Deed Restriction under protest and without waiving legal and constitutional rights, so as to enable the applicants to undertake the development for which the Permit is required;

AND WHEREAS, said Deed Restriction provides lateral public access for that portion of said property extending seaward from the seawall of the applicants' ownership to the mean high tide line in furtherance of the policies of the California Coastal Act to provide for public access along the coast;

NOW, THEREFORE in consideration of the granting of Permit No. ..... to the owners and beneficiaries of the Trust Agreement by the California Coastal Commission, the owners and beneficiaries thereby irrevocably agree that there be and hereby is, created the following restriction on the use and enjoyment of said property to be attached to and become a part of the deed to the property:

Public Access

A public servitude is hereby created on that portion of the above-referenced real property extending from the mean high tide line to the toe of the seawall revetments providing for permissive use of the public to traverse by means of walking and running in a direction parallel with the mean high tide line across each of the aforementioned lots. This public servitude shall allow members of the public access to the ocean to pass and repass across that property encumbered by this deed restriction.

This deed restriction allows the public lateral access on the properties of the permittees as described above but specifically precludes activities including camping, parties, sports activities, exercising of animals, and other activities which create a noise, public nuisance or in any way invade the privacy of the residents.

This servitude and restriction on the use and enjoyment of the land owned by the permittees indicate that it is expressly understood that the public is gaining no greater right than those specified in this document. This deed restriction applies solely to lateral access. No vertical access rights are created by grant of this servitude

inasmuch as vertical access rights have been provided within a reasonable distance from these lots.

The permittees, by agreeing to this deed restriction and public servitude, agree for themselves, their successors and assigns, that they shall make no use of that portion of the beach lying seaward of the toe of the seawall contrary to the rights being conferred on the public by creation of this servitude and covenant running with the land.

Liability Waiver

The permittee understands that (1) the site is subject to extraordinary hazard from waves during storms and the permittee assumes the liability from those hazards; (2) the permittee unconditionally waives any claim of liability on the part of the Commission or any other public agency for any damage from such hazards; and (3) the permittee understands that construction in the fact of these known hazards may make him ineligible for public disaster funds or loans for repair, replacement, or rehabilitation of the property in the event of storms.

Title

This Deed Restriction is executed under protest and shall not be construed as a waiver by the applicants and permit holders of their rights, if any, to be free from government-compelled dedication of private property for public use without just compensation, in violation of the Fifth Amendment Accordingly, this Deed Restriction shall terminate forthwith in the event that a court of competent jurisdiction finally determines that the condition

requiring this Deed Restriction is illegal or unconstitutional, and/or in the event that the California Coastal Commission voluntarily agrees to remove the restriction, so that any benefit this Deed Restriction purported to convey will be restored to the fee owner of the property and any restrictions it purported to impose will be removed.

Said deed restriction shall remain in full force and effect during the period that said permit, or any modification or amendment thereof, remains effective and during the period the development authorized by said permit or any modification of said development remains in existence in or upon any part of, and thereby confers benefit upon the real property described herein and to that extent, said deed restriction is hereby deemed and agreed by owners to be a covenant running with the land and shall bind owner and all their assigns or successors in interest. If for any reason the development as approved in the Permit is not commenced and the Permit expires, this Deed Restriction shall terminate forthwith and be of no force and effect.

Faria Beach Trust, legal owner

DATED: .....

.....
Signature

.....
Print or Type Name of Above

DATED: .....

.....
Signature

.....
Print or Type Name of Above

DATED: .....

.....
Signature

.....
Print or Type Name of Above

Beneficiaries Under Trust Agreement dated May 27, 1981

DATED: .....

.....
Signature

.....
Print or Type Name of Above

DATED: .....

.....
Signature

.....
Print or Type Name of Above

This is to certify that the Deed Restriction set forth above dated ....., 1983, and signed by ....., owner(s), and ....., beneficiaries under Trust Agreement dated May 27, 1981, is hereby acknowledged by the undersigned officer on behalf of the California Coastal Commission pursuant to authority conferred by the California Coastal Commission when it granted Coastal Development Permit No. ..... on ..... and the California Coastal Commission consents to recordation thereof by its duly authorized officer.

DATED: .....

.....
California Coastal Commission

STATE OF CALIFORNIA)
) : ss.
COUNTY OF SAN FRANCISCO)

On ....., 1983, before the undersigned a Notary Public in and for said county and state, personally appeared ..... known to me to be the ..... of the California

Coastal Commission and known to me to be the person who executed the within instrument on behalf of said Commission, and acknowledged to me that such commission executed the same.

Witness my hand and official seal.

.....

Notary Public in and for said County and State

EXHIBIT F

CALIFORNIA COASTAL COMMISSION

631 Howard Street, San Francisco 94105 — (415) 543-8555

May 24, 1983

TO: STATE COMMISSION AND INTERESTED PERSONS

FROM: MICHAEL L. FISCHER, EXECUTIVE DIRECTOR

SUBJECT: NOLLAN—APPL. NO. 4-82-90: RESPONSE TO DRAFT DEED RESTRICTION LANGUAGE SUBMITTED BY APPLICANTS

At the April 26, 1983 hearing on Application No. 4-82-90 (applicants: James P. and Marilyn H. Nollan) the applicants' representative submitted proposed language to comply with a proposed condition to permit public access across the subject parcel in Ventura County (See attachment). The Commission directed its staff to examine the draft language and to respond to the applicants' offer.

The draft offer expresses strong feelings which insinuate that the Commission's pending action on the applicants' request would be unconstitutional; because of this insinuation, I cannot recommend that the Commission approve the offer as submitted. I do not agree with the contentions made, and, as Executive Director of the Commission, I cannot approve either the form or the content of the draft offer. The presence of contentions of unconstitutionality and illegality will inhibit an agency from accepting the offer because the offer appears to be coerced. The element of coersion jeopardizes the validity of the document which the Commission is finding necessary to assure consistency of the Nollans' residential project with the Coastal Act.

If the Nollans believe the Commission's action on the permit conditions is unjustified, illegal or unconstitutional, it is my recommendation that the Nollans should be urged to fully exercise their legal rights to challenge the conditions. The Commission is willing to defend such action on its pending decision to approve the proposed development, as recommended by Commission staff. The Nollans also have the option of not accepting the permit, not constructing the project, waiting six months from the date of the Commission's action and submitting a *new* application for review. Any new application would be reviewed on its merits de novo. However, if the Nollans decide to accept the benefits of the permit as acted upon by the Commission, which allows construction of a residential development adjacent to public tidelands within the Faria Beach Tract, it is necessary for the Nollans to submit an offer that is non-prejudicial to an accepting

agency and that does not contemplate a legal challenge to the Commission's action on the permit.

Given these options, I do not agree that the conditions amount to coercion and I cannot agree to the language suggested by the Nollans' representative. I would recommend to the Commission that it approve the proposed development as conditioned for approval by Commission staff, without any changes to the deed restriction condition of approval.

Title

This Deed Restriction is executed under protest and shall not be contrued as a waiver by the applicants and permit holders of their rights, if any, to be free from government-compelled dedication of private property for public use without just compensation, in violation of the Fifth Amendment. Accordingly, this Deed Restriction shall terminate forthwith in the event that a court of competent jurisdiction finally determines that the condition requiring this Deed Restriction is illegal or unconstitutional, and/or in the event that the California Coastal Commission voluntarily agrees to remove the restriction, so that any benefit this Deed Restriction purported to convey will be restored to the fee owner of the property and any restrictions it purported to impose will be removed.

Said Deed Restriction shall remain in full force and effect during the period that said permit, or any modification or amendment thereof, remains effective and during the period the development authorized by said permit

or any modification of said development remain in existence in or upon any part of, and thereby confers benefit upon the real property described herein and to that extent, said Deed Restriction is hereby deemed and agreed by owners to be a covenant running with the land and shall bind owner and all their assigns or successors in interest. If for any reason the development as approved in the Permit is not commenced and the Permit expires, this Deed Restriction shall terminate forthwith and be of no force and effect.

EXHIBIT H

DECLARATION OF JAMES PATRICK NOLLAN

I, James Patrick Nollan, declare as follows:

I am one of the applicants on California Coastal Development Permit Application Number 4-82-90. I was also a participant in the court proceedings relating to said permit application.

I previously filed with the California Coastal Commission (hereinafter "Commission") written objections to the Commission's requirement that applicants dedicate by deed restriction lateral access to the public as a condition precedent to granting the development permit sought herein. A copy of said written objections are attached hereto as Exhibit 1 and incorporated herein as if set forth at length.

Applicants' proposed single-family residence will increase the footprint (plan view) of the structure from 521 square feet to 1235 square feet. The Commission nevertheless seeks to require applicants to dedicate in excess of thirty-one percent of applicants' private property as a condition to replacing the existing substandard single-family

dwelling. The amount of applicants' property demanded by the Commission exceeds the footprint of the proposed new single-family dwelling and is nearly twice the size of the increase in the footprint resulting from the proposed construction.

There are no accessory residential structures to be built with the proposed single-family residence. The architectural plans submitted with the application herein clearly show that only a single-family residence is contemplated.

The proposed single-family residence will not be built on any public land. It will be constructed totally on applicants' property. The State Lands Commission has previously inspected the Faria subdivision which includes applicants' property and determined that no public lands are involved with such development. See Reporter's Transcript (hereinafter R.T.) of Hearing Before the California State Coastal Commission, June 19, 1979, Appeal Nos. 172-79 and 173-79, R.T. page 2, lines 7-10; R.T. page 7, lines 25-28; and R.T. page 8, lines 1-3.

Applicants James Patrick Nollan and Marilyn Harvey Nollan own the property described in permit application No. 4-82-90 as Trustors and Beneficiaries of the Faria Beach Trust. The form of ownership is consistent with the "Memorandum of Trust Agreement" which is attached hereto as Exhibit 2. The Faria Beach Trust (and accordingly applicants) hold title to the real property identified as the "Cove." See Exhibit 3 attached to the Staff Report and Recommendation. The Faria Beach Trust and its predecessors in interest, the Faria Family Partnership, have allowed by express permission public access at the

Cove. The Cove is less than 1800 feet from the site of applicants' proposed single-family residence.

Public lateral access exists between applicants' most seaward property boundary and the mean high tide line. Lateral and vertical access also exist at nearby Faria County Park which was donated to the public by the predecessors in interest in the land now owned by the applicants and the Faria Beach Trust. Faria County Park is between one-third and one-half mile from applicants' property. The public property seaward of applicants' property provides public lateral access on existing public property laterally and seaward of applicants' property line and similarly laterally and seaward of all other private property adjacent thereto. These tidelands are easily reached from both the aforementioned Faria County Park and Cove.

The California Coastal Commission in reviewing previous development permit applications for the Faria Beach area has consistently found that adequate public access exists at nearby Faria County Park. See, for example, Application No. 203-25, Applicants Faria Family Partnership, et al., wherein the Commission's Staff Report states at page six: "The Faria County Park is located between one-quarter and one-third mile upcoast from the subject site and provides adequate vertical access to the public lands seaward of the mean high tide." See also, Application No. 203-26, Applicants Faria Family Partnership, et al., wherein the staff report states at page six: "There exists both upcoast and downcoast from the subject's site adequate vertical access. . . ." Clearly adequate public access exists nearby applicants' property and any statements to the contrary are simply unfounded.

View from the old Pacific Coast Highway and also from the new freeway will not be affected by demolition and reconstruction of applicants' single-family residence. Pictures from the two roadways show (1) that the existing structure prohibits all "view" of the coastline from the old Pacific Coast Highway (Exhibit 3); (2) neither the existing nor proposed residence is visible from the northbound freeway lanes (Exhibit 4); and (3) the residence is visible only from the most seaward southbound freeway lanes. There is no parking allowed on the freeway for persons to view applicants' residence (Exhibit 5). Furthermore, the closest southbound exist off the freeway from the point adjacent to applicants' property is in excess of four miles away.

When the beach has experienced accretion during a given year, applicants' most seaward property line is several feet above the mean high tide line. Neighboring residents of the area often store their sailboats (catamarans, hobycats, etc.) on the sand seaward of the seawall during these periods. Volleyball courts are also erected during these times and remain undisturbed by the tides.

There are two existing palm trees on applicants' property. The two trees are located between the existing structure and the existing seawall. See Commission's "Staff Report and Recommendation," Exhibit 2. The trees will not be removed by the proposed demolition and reconstruction, but rather will be preserved thereby. The existing palm trees exceed the height of applicants' proposed single-family dwelling.

The Commission's "Staff Report and Recommendations" (hereinafter "Report") regarding the size of applicants' proposed residence is misleading. For example, page eleven of the Report states:

> "The proposed development would increase lot coverage so that the results of development would create lot coverage by residential structures totalling 2,464 square ft. The applicants' lot is 2,800 sq. ft. in size. The applicants' proposed development will increase lot coverage by nearly five times from what exists presently on the site. . . ."

It appears that the Report has merely doubled the area of the first floor to arrive at a number (2,464 sq. ft.) it describes as "lot coverage." This is misleading and causes confusion rather than aiding analysis. It can be compared to adding the area of the roof of a structure for purposes of identifying lot coverage. The Report further states that applicants' lot is merely 2,800 square feet. The Report's own Exhibit 2 (a copy of the architectural plot plan submitted with the application herein) shows this to be obviously incorrect. Evidently, the staff has unilaterally attempted to usurp applicants' property seaward of the existing seawall.

The properties adjacent to applicants' property are planned for two-story, single-family dwellings. Demolition has already begun on both adjacent properties. The majority of the dwellings in the area of applicants' property are two-story, single-family dwellings.

The Staff Report and Recommendation includes as an exhibit a letter from a Mr. Kilbourne. Mr. Kilbourne's letter of years ago referring to a different application attaches pictures of an unrelated area, apparently Carpenteria, which is several miles north of Applicants' property.

All the facts set forth in this declaration are within my personal knowledge and if sworn as a witness I will testify competently thereto.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 25 day of May, 1983 at Los Angeles, California.

/s/ JAMES PATRICK NOLLAN

RONALD A. ZUMBRUN
HAROLD J. HUGHES
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Petitioners

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF VENTURA

Civ. No. SP 50805

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

DECLARATION OF JAMES PATRICK NOLLAN

(Filed October 31, 1983)

I, James Patrick Nollan, declare as follows:

My wife and I are the petitioners seeking a writ of administrative mandamus in this action. We have contracted with the Faria Beach Trust to purchase the lot we are now leasing. A condition of sale is that we remove the substandard structure currently located on the lot. Over a year ago we applied for a permit from the California Coastal Commission. The commission, however, has refused to approve our permit unless we agree to dedicate our beachfront

(nearly one-third of our property) to public access. Exhibit A is a letter from the Faria Beach trustees stating that the date for opening escrow is November 10, 1983, by which time we are to have demolished the building now on the lot.

On January 18, 1983, this Honorable Court ordered a peremptory writ of mandamus to issue requiring the commission to hold a public hearing and "make proper evidentiary findings." The Court stated that a "valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access" and concluded that "[n]o such burden is shown by the facts in the administrative record."

Although Public Resources Code § 30621 required the commission to hold the mandated hearing no later than 49 days after service of the court's order, the commission did not open the hearing until April 28, 1983, 100 days afterwards. It then continued the hearing for a month later because, according to District Director Ryerson, the staff was "in the process still of completing the findings" and because the staff had neglected to include this Court's Statement of Decision among its 17 "substantive file documents." *See* Transcript of April 28, 1983, hearing before the California Coastal Commission at 1, 3-4, Exhibit F to Petitioners' Memorandum of Points and Authorities, filed October 21, 1983.

Once the hearing was finally held, despite this Court's writ of mandate, and relying on the same evidence that was before this Court when it issued that writ, the commission again demanded that we dedicate our beachfront to the public.

We offered to make the demanded dedication under protest, reserving the right to question, in this lawsuit, the

constitutionality of the commission's action. The commission would not accept our dedication under protest.

On June 1, 1983, six days after the commission's decision, we requested the commission to prepare the administrative record for this petition. Code of Civil Procedure § 1094.5 directs the commission that "the administrative record shall be filed as expeditiously as possible" and Government Code § 11523 gives the commission an upper limit of 30 days from the date of request to prepare and deliver the record upon payment of the fee specified. We paid the fee ($670.25) over two and a half months ago. The record is now nearly four months overdue.

We filed our present petition for writ of mandate on July 15, 1983. Because the November 10 deadline for demolition of the existing structure was fast approaching, we were forced to file our points and authorities and move for a hearing without the record. (Copies of the documents that would appear in the record were supplied as exhibits and transcripts of the commission's hearing were filed with our points and authorities.) The commission has had since July 15, however, when our petition was filed, to prepare an answer if it wished.

The commission realizes we are under a time restraint. The endless delays outline above lead me to believe the commission is trying to delay long enough to make this case moot. The commission knows that each delay pushes us closer and closer to the date when we will be forced to choose between losing our property altogether or surrendering our beachfront to public access without the benefit of judicial review.

The strong public interest in resolving disputes on their merits, the unclean hands of the commission in unlawfully

delaying for months our hearing, and then unlawfully delaying for months the preparation of its record, while refusing to accept our dedication under protest, coupled with the hardship that would result to my wife and me, all suggest that the commission's access dedication condition should be stricken without a remand which would only allow further commission foot-dragging.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 28 day of October, 1983, at Los Angeles, California.

/s/ JAMES PATRICK NOLLAN

EXHIBIT A

FARIA BEACH TRUST
c/o Bank of A. Levy
P.O. Box 5190
Ventura, CA 93003

September 30, 1983

Mr. and Mrs. James P. Nollan
407 So. Mansfield Avenue
Los Angeles, CA 90036

Re: Lot 58, Faria Beach

Dear Pat:

The trustees would like to complete the escrow with you. Until you remove the existing sub-standard structure on the premises, this can't be accomplished.

We are getting complaints about the unsightly appearance of your property. The trustees are now determined to bring this matter to a head, whether or not you attain your objective vis a vis the Coastal Commission.

Accordingly, please be advised that you have until November 10, 1983 to demolish and remove the structure and appurtenances on Lot 58. Please notify us when this has been accomplished, and we will proceed with the escrow.

Very truly yours,

/s/ Frank E. Orr
Secretary and Co-Trustee

FEO/bc

JOHN K. VAN DE KAMP, Attorney General
of the State of California
N. GREGORY TAYLOR
Assistant Attorney General
JAMEE JORDAN PATTERSON,
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-6050
Attorneys for Respondent
California Coastal Commission

IN THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF VENTURA

NO. SP 50805

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

RESPONDENT'S REPLY TO SUPPLEMENTAL PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS

(Filed November 25, 1983)

Respondent California Coastal Commission hereby makes its reply by way of answer to the supplemental petition for writ of administrative mandamus filed by James Patrick Nollan and Marilyn Harvey Nollan, and denies, admits and affirmatively alleges as follows:

1. Respondent admits the allegations of paragraph 1.

2. Answering paragraph 2, respondent admits that the Nollans applied to respondent for a permit to demolish a substandard beach house and replace it with a three-bedroom residence for their family; except as expressly so admitted, respondent denies each and every allegation of paragraph 2.

3. Respondent denies the allegations of paragraph 3.

4. Respondent admits the allegations of paragraph 4.

5. Respondent denies the allegations of paragraph 5.

6. Respondent admits the allegations of paragraph 6.

7. Respondent denies the allegations of paragraph 7.

8. Respondent denies the allegations of paragraph 8.

9. Respondent denies the allegations of paragraph 9.

10. Respondent denies the allegations of paragraph 10.

11. Respondent admits the allegations of paragraph 11.

12. Respondent admits that respondent is now and at all times relevant herein has been the agency charged with administering provisions of the Coastal Act, that respondent is charged by law with the duty to adopt such guidelines as are not in conflict with the provisions of the Coastal Act, nor enlarge the powers of the Commission in violation thereof. Except as expressly so admitted respondent denies the allegations of paragraph 12.

13. Respondent admits the allegations of paragraph 13.

14. Respondent admits the allegations of paragraph 14.

15. Respondent denies the allegations of paragraph 15 based upon lack of information and belief.

16. Respondent admits the allegations of paragraph 16.

17. Respondent admits the allegations of paragraph 17.

18. Respondent denies the allegations of paragraph 18 based upon lack of information and belief.

19. Respondent admits the allegations of paragraph 19.

20. Respondent admits the allegations of paragraph 20.

21. Respondent admits the allegations of paragraph 21.

22. Respondent denies the allegations of paragraph 22.

23. Respondent admits the allegations of paragraph 23.

24. Respondent admits the allegations of paragraph 24.

25. Respondent admits the allegations of paragraph 25.

26. Respondent admits the allegations of paragraph 26.

27. Respondent admits the allegations of paragraph 27.

28. Respondent admits the allegations of paragraph 28.

29. Respondent admits the allegations of paragraph 29.

30. Respondent denies the allegations of paragraph 30.

31. Respondent denies the allegations of paragraph 31.

32. Respondent denies the allegations of paragraph 32.

33. Respondent admits that on May 26, 1983, the Commission by a vote of 10 to 2 adopted the staff report and recommendation. Except as expressly so admitted, respondent denies the allegations of paragraph 33.

34. Respondent admits that petitioners offered to record under protest the deed restriction required by the Commission. Except as expressly so admitted, respondent denies the allegations of paragraph 34.

35. Respondent admits the allegations of paragraph 35 and affirmatively alleges that the Commission stated it was necessary for the Nollans to submit an offer that was non-prejudicial to an accepting agency and that did

not contemplate a legal challenge to the Commission's action on the permit.

36. Respondent admits the allegations of paragraph 36.

37. Respondent admits that Faria County Park is within one-quarter mile of the Nollan property and was donated to the public by the Faria family. Respondent admits that the "cove" is located within the 1,800 feet of the Nollan property. Except as expressly so admitted, respondent denies the allegations of paragraph 37.

38. Respondent denies the allegations of paragraph 38.

39. Respondent denies the allegations of paragraph 39.

40. Respondent admits that Public Resources Code section 30620 provides as its language so indicates. Except as expressly so admitted, respondent denies the allegations of paragraph 40.

41. Respondent admits that respondent has promulgated the Public Access Guidelines pursuant to the Coastal Act; except as expressly so admitted, respondent denies the allegations of paragraph 41.

42. Respondent denies the allegations of paragraph 42.

43. Respondent admits that the Public Access Guidelines provide as their language indicates; except as expressly so admitted, respondent denies the allegations of paragraph 43.

44. Respondent denies the allegations of paragraph 44.

45. Respondent admits that the language of the Public Access Guidelines provide as their language indicates; except as expressly so admitted, respondent denies the allegations of paragraph 45.

46. Respondent denies the allegations of paragraph 46.

47. Respondent denies the allegations of paragraph 47.

48. Respondent denies the allegations of paragraph 48.

49. Respondent denies the allegations of paragraph 49.

50. Respondent denies the allegations of paragraph 50.

51. Respondent denies the allegations of paragraph 51.

52. Respondent denies the allegations of paragraph 52.

53. Respondent denies the allegations of paragraph 53 and each and every sub-part thereof.

54. Respondent denies the allegations of paragraph 54.

55. Respondent denies the allegations of paragraph 55.

56. Respondent denies the allegations of paragraph 56.

57. Respondent denies the allegations of paragraph 57 and each and every sub-part thereof.

58. Respondent denies the allegations of paragraph 58 and each and every sub-part thereof.

59. Respondent denies the allegations of paragraph 59.

60. Respondent denies the allegations of paragraph 60.

61. Respondent denies the allegations of paragraph 61.

62. Respondent denies the allegations of paragraph 62.

63. Respondent denies the allegations of paragraph 63.

64. Respondent denies the allegations of paragraph 64.

65. Respondent denies the allegations of paragraph 65.

66. Respondent denies the allegations of paragraph 66.

67. Respondent denies the allegations of paragraph 67.

68. Respondent denies the allegations of paragraph 68.

AFFIRMATIVE DEFENSES

Respondent affirmatively alleges as follows:

69. The supplemental petition fails to state facts sufficient to constitute a cause of action.

70. Respondent did not abuse its discretion, its decision is supported by substantial evidence in the administrative record and it proceeded in the manner required by law.

71. The writ of mandate, if enforced, would prevent the enforcement of valid State laws and improperly circumscribe the discretion lawfully vested in respondent.

WHEREFORE, respondent California Coastal Commission prays for judgment as follows:

1. That the supplemental petition for writ of mandate be denied and petitioners take nothing by their action;

2. That petitioners are not entitled to an award of attorneys' fees;

3. That respondent be awarded costs, including reasonable attorneys' fees;

4. For such other and further relief as the court deems just and proper.

Dated: November 21, 1983.

JOHN K. VAN DE KAMP,
Attorney General
N. GREGORY TAYLOR,
Assistant Attorney General
JAMEE JORDAN PATTERSON,
Deputy Attorney General

By: Jamee Jordan Patterson
Deputy Attorney General

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF VENTURA

Civ. No. SP 50805

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

JUDGMENT GRANTING PEREMPTORY
WRIT OF MANDAMUS

(Filed February 15, 1984)

This matter came regularly before this Court on December 6, 1983, for hearing, the Honorable William L. Peck, presiding. Harold J. Hughes appeared as attorney for petitioners and Jamee Jordan Patterson, Deputy Attorney General, appeared as attorney for respondent. The record of the administrative proceedings having been received into evidence and examined by the Court, arguments having been presented, both oral and written, and the matter having been submitted for decision and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED:

1. That a peremptory writ of administrative mandamus shall issue from this Court commanding respondent to strike the special conditions from its approval of petitioners' coastal development permit application No. 4-82-90, and to extend the expiration date of petitioners' permit,

free of conditions, to a date two years from the date this judgment is entered in the Judgment Book.

2. That petitioners shall recover their costs, including its attorneys' fees under Govt Code § 800.

3. That this Court shall retain jurisdiction over the amount of attorneys' fees pending further hearing.

DATED: Feb. 10, 1984.

/s/ WILLIAM L. PECK
Judge of the Superior Court

Judgment entered on _____, _____, in the Judgment Book, Volume No. _____, Page No. _____.

/s/ RICHARD D. DEAN, Clerk

IN THE SUPERIOR COURT OF THE
STATE OF CALIFORNIA IN AND FOR
THE COUNTY OF VENTURA

Civ. No. SP 50805

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Petitioners,

v.

CALIFORNIA COASTAL COMMISSION,

Respondent.

STATEMENT OF DECISION

(Filed February 15, 1984)

Petitioners' Petition for Writ of Administrative Mandamus will be granted as set forth below:

This is the second time petitioners' case is before this Court. The following undisputed facts appear in the administrative record. Petitioners are lessees and purchasers of a small residential lot located in the Faria Beach Tract along the coast in Ventura County. The Faria Beach Tract is a subdivision of 138 lots. Petitioners applied to the California Coastal Commission for a permit to demolish a tiny, substandard beach house now occupying the lot, and replace it with a larger house, similar to the other houses in the area, that would comply with local building, health, and safety code requirements. Petitioners' permit application was reviewed by the executive director of the commission and approved by the commission on the administrative permit calendar, subject to the condition that petitioners record a deed dedicating their entire beach seaward of their seawall to public access, approximately one-third of their property.

Petitioners appeared before this Court in December, 1982, requesting that the commission be ordered to delete the public access condition from its approval of their permit.

The administrative record before the Court at that time contained, in addition to many other things, petitioners' permit application and additional project information solicited by the commission which, together, detailed the location, dimensions, number of rooms, and intended use of both the existing house and the proposed house.

Petitioners argued, and this Court agreed, that under the California Coastal Act, Public Resources Code §§ 30000, *et seq.*, the commission's authority to impose public access requirements as a condition to permit approval is limited to situations where, subsequent to an evidentiary

hearing, it is shown that the applicant's proposed development will have an adverse impact on public access to the sea, and even then only if adequate access is not already available. This Court's statement of decision stated in part: "A valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access. Such evidentiary showing should either demonstrate immediate impact or verifiable, nonspeculative cumulative impact." This Court then concluded that no such burden on public access was demonstrated by the facts in the administrative record.

The respondent persuaded this Court that the case should be returned to the commission for a public hearing. Accordingly, on January 18, 1983, this Court issued its peremptory writ of mandate ordering the commission to hold a public hearing on petitioners' application and make proper evidentiary findings in accordance with the statement of decision.

This Court's ruling was not appealed and thus became part of the law of this case.

The commission opened the mandated hearing on April 28, 1983, but continued the hearing to May 26. The staff neglected to include this Court's statement of decision among the 17 "substantive file documents" listed in its April report. This Court's statement of decision was finally placed, at petitioners' urging, before the commission at the May 26 hearing and is included in the administrative record. The revised staff report presented at the May 26 hearing included excerpts from this Court's statement of decision, but deleted the portion quoted above dealing with the type of evidentiary showing that had to be produced

on remand. At the conclusion of the hearing on May 26, 1983, the commission voted to approve petitioners' permit, again subject to the identical condition requiring petitioners to dedicate their beach to public access.

On June 23, 1983, after the May 26 vote was taken, the commission held another hearing, to revise its findings. There is a dispute between the parties as to whether petitioners were given notice of this hearing, but no dispute that petitioners were not present.

Petitioners are again before this Court, complaining, among other things, that the commission did not comply with this Court's prior writ of mandate and that the condition requiring a dedication of access is still unjustified.

This Court agrees.

I

This Court's order stated that the commission, in order to require a dedication of access from petitioners, must first make an evidentiary showing of direct and definable adverse impact on public access which should either demonstrate immediate impact or verifiable, nonspeculative, cumulative impact.

A review of the administrative record indicates that the commission's own staff were petitioners' principal adversaries on remand, improperly assuming the role of advocates. In response to the Court's order the commission's staff supplied the commission with books and articles about access problems in other states, the impact in general of new subdivision building in previously undeveloped areas, a draft land use plan for Santa Monica, mimeographed form declarations from some surfers, and studies

of shoreline conditions at Lake Tahoe. The staff report contained speculation that replacement housing "would present a psychological barrier to the public" and might someday lead to the construction of gas stations, stores, and restaurants. The staff report discussed the disposition made on other, unrelated permit applications and included as exhibits a letter and two photographs of a different part of the coast, submitted four years earlier in an unrelated proceeding. This type of evidence is either not specific to the Nollan property or too speculative in nature to support a finding that this project, by these petitioners, will create a direct or cumulative burden on public access to the sea.

In addition to this "new evidence," the staff report discusses the size, lot position and lot coverage, number of rooms, and intended use of petitioners' proposed replacement house. This information, however, was contained in the prior record which was before this Court when it issued its first writ of mandate.

Since no appeal was taken from this Court's first decision, which held that the evidence in the record did not support a finding that petitioners' proposed development would burden the public, the same decision is compelled by the fact that no new evidence of any relevance has been added to the record this time around.

II

Public Resources Code § 30212 states that "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where . . . (2) adequate access exists nearby. . . ."

To the extent Section 30212 allows the imposition of dedication conditions, it does so only when the development is a "new development project"—it does not empower the commission to impose dedication conditions whenever a permit may be required.

The commission points out that Subsection (b) of Section 30212 lists a variety of improvements to property which the Legislature has specifically indicated are not "new development projects," including demolition and reconstruction of a single-family residence where the reconstructed dwelling is not more than 10% larger. The commission thus urges the conclusion that any development not specifically exempted by this list must be characterized as a "new development project" and be required to surrender access.

As this Court reads the Coastal Act, however, the commission's interpretation does not harmonize with the rest of the Act. In a case such as petitioners', a 10% enlargement of their tiny house would barely be enough to add a good-sized closet to their old floorplan, and would still leave their new home out of character for the neighborhood and uncomfortably small for an average family. A test for the imposition of access requirements which automatically required a dedication of access for any reconstruction exceeding 10% of the former structure would be unreasonably harsh and would not square with the apparent meaning given by the Legislature to the term "new development projects."

In its earlier statement of decision, this Court stated:

> "Though the Legislature intended that the construction of single-family residences on vacant lots

> be considered new development subject to the access requirements of section 30212, it did not intend that the expansion or enlargement of existing residences be considered new development absent a showing that they had an individual or cumulative adverse impact on public access to the sea."

This seems to be the better interpretation of Section 30212, since it avoids issues of constitutionality inherent in the automatic test proposed by the commission.

Thus, this Court concludes that since the record does not support a finding that petitioners' project would burden public access, the project does not fall within the definition of "new development project."

III

As noted above, Public Resources Code § 30212 authorizes the exaction of access from new development projects "except where . . . (2) adequate access exists nearby." Section 30212 thus creates a two-part test. Access cannot be exacted where an improvement to property is not properly classifiable as a "new development project." Even when a project does qualify as new development, however, access cannot be exacted if adequate access already exists nearby. Apart from the number of other public beaches in the north county area, the commission staff report finds that "Faria County Park is located between one-quarter to one-third of a mile upcoast, and the Cove Beach area is located approximately 1,800 feet downcoast."

The only way access could be found to be inadequate in a case like this would be if the Coastal Act required public beaches, where separated, to be connected. This

Court does not consider such to be a fair reading of the Act, however, since until all beach property is made public, there will always be a separation between public beaches.

IV

In ruling on the above matters, this Court expressly reserves judgment on certain other matters raised by the pleadings. In particular, no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in petitioners' beach have been acquired through prescriptive use. Similarly, this Court reserves judgment on whether the commission failed to act in a timely fashion on remand, whether the commission's interpretive guidelines are valid as applied, and on other issues not expressly addressed above.

Judgment in accord with this decision shall be entered ordering a peremptory writ of mandate to issue from this Court, directing respondent to strike the conditions from petitioners' coastal development permit, and to extend petitioners' permit, free of conditions, for a period of two years from the date the judgment is entered.

Petitioners shall have their costs. Petitioners have also requested attorneys' fees pursuant to Government Code § 800, and Code of Civil Procedure § 1021.5. Petitioners shall be awarded their reasonable attorneys' fees under Government Code § 800 in an amount of $1500.00.

DATED: Feb. 10, 1984.

/s/ William L. Peck
Judge of the Superior Court

[Civ. No. B004663. Second Dist., Div. Six. Jan. 24, 1986.]

JAMES PATRICK NOLLAN et al.,
Petitioners and Respondents,
v.
CALIFORNIA COASTAL COMMISSION,
Respondent and Appellant.

COUNSEL

John K. Van de Kamp, Attorney General, N. Gregory Taylor, Assistant Attorney General, Jamee Jordan Patterson, Deputy Attorney General, for Respondent and Appellant.

Ronald A. Zumbrun, Robert K. Best and Timothy A. Bittle for Petitioners and Respondents.

OPINION

ABBE, J.—Appeal by California Coastal Commission (Commission) from judgment granting a peremptory writ of mandate to James and Marilyn Nollan (the Nollans). In its judgment the trial court held invalid the Commission's conditional approval of a coastal owner's development project. The condition imposed required the owners to provide lateral access to the public to pass and repass across the property between the mean high tide line to the toe of a revetment located on the property. The judgment ordered the Commission to issue the permit without the condition. We reverse the trial court and affirm the decision of the Commission.

The Nollans own a lot on the beach in the Faria Beach Tract in Ventura County. On March 1, 1982, they applied

for a coastal development permit to demolish a 521 square foot, one bedroom, one story, substandard beach house located on their lot. The Nollans proposed to replace it with a two-story, three bedroom, 1674 square foot residence with attached two car garage. Their stated intention is to live in the new residence permanently in contrast to the limited occasional vacation use by them and renters of the smaller structure.

The Commission placed the Nollans' application on what is known as the administrative permit calendar and approved it on April 7, 1982, with a condition requiring lateral public access. The Nollans objected to that condition and requested a full public hearing. This request was denied.

The Nollans then filed a petition for a writ of mandate. On January 18, 1983, after a hearing, the court ordered that a "writ of mandate shall issue from this court, remanding the proceedings to respondent and commanding respondent to set aside its decision on April 7, 1982 . . . and set the matter for a full evidentiary hearing."

Upon remand a full public hearing was held before the Commission. At the conclusion of the hearings, the Commission approved the Nollans' application permit again with the condition requiring lateral public access.

The Nollans filed a supplemental petition for writ of mandate. The trial court issued a peremptory writ commanding the Commission to issue the permit without the condition requiring public access. The Commission appealed.

Standard of Review

When the decision of an administrative agency neither involves nor substantially affects a fundamental vested

right, the standard of review in both the trial and the appellate court is whether the findings are supported by substantial evidence. (*Georgia-Pacific Corp. v. California Coastal Com.* (1982) 132 Cal.App.3d 678, 697 [183 Cal.Rptr. 395].) The Nollans did not have a preexisting right to unregulated new construction. Since they were given the right to construct, the only question that remains is the reasonableness of the condition attached. We therefore review the administrative record to determine whether the Commission's decision is supported by substantial evidence in light of the whole record. (*City of San Diego v. California Coastal Com.* (1981) 119 Cal.App.3d 228, 232 [174 Cal.Rptr. 5].)

Evidence

There is substantial evidence to support the decision of the Commission. The evidence considered by the Commission consisted of the following: Reports on 12 permits for demolition and reconstruction of single family residences in the Faria Beach tract and four other permits, the statewide interpretative guidelines on access, a Ventura beach study (which includes Faria beach), testimony from citizens, a report on an investigation of the existence of public rights acquired through implied dedication at Faria, including declarations by surfers who frequent Faria beach, excerpts from surfing publications about the area, a commission study on coastal access in San Diego, a study of cumulative impacts on shore-zoned development at Lake Tahoe, a hand book on coastal recreation for planners, three articles on coastal access problems encountered in other states, and a beach user study component of the Santa

Monica Land Use Plan as well as slides, plans and documents submitted by the Nollans and Mr. Nollan's testimony.

All this mass of evidence was and could be considered. The Commission may consider opinion evidence of experts, oral presentations at the public hearing, photographic evidence and writ materials prepared by its staff. *(City of Chula Vista v. Superior Court* (1982) 133 Cal.App.3d 472 [183 Cal.Rptr. 909].)

The trial court found that the evidence did not support a finding that the Nollans' project would create a "direct or cumulative burden on public access to the sea." Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error.

Discussion

In *Grupe v. California Coastal Com.* (1985) 166 Cal. App.3d 148, 165 [212 Cal.Rptr. 578], the court construed the leading California case on the constitutionality of exactions, *Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633 [94 Cal.Rptr. 630, 484 P.2d 606, 43 A.L.R.3d 847], to hold that only an indirect relationship between an exaction and a need to which the project contributes need exist. We agree with the *Grupe* reasoning.

In *Grupe* the landowner owned one of six remaining undeveloped beach front lots in a group of twenty-nine adjacent lots in Santa Cruz County. The 29 lots were located between two beaches open to public use. Grupe applied for a permit to build a large single family residence to be located behind a cement wall on his lot. The Commission approved the permit subject to a requirement that Grupe offer to dedicate a public access easement between mean high tide and the cement wall.

The court in *Grupe* held that the access condition was related to a need for public access to which Grupe's project contributed, even though standing alone it had not created the need for access. The court reasoned the project was one more brick in the wall separating the people of California from the state's tidelands. (*Id.*, at p. 168.)

The *Grupe* court also held that the exaction did not constitute a "taking" because although it caused a diminution in the value of Grupe's property, it did not deprive him of the reasonable use of his property. *(Id.*, at pp. 175-176.)

As we pointed out in *Remmenga v. California Coastal Com.* (1985) 163 Cal.App.3d 623, 628 [209 Cal.Rptr. 628], the justification for required dedication is not limited to the needs of or burdens created by the project. Here the Nollans' project has not created the need for access to the tidelands fronting their property but it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access. The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission's decision.

This case and *Grupe* differ in that *Grupe* involved construction of a residence on one of the few remaining vacant lots in the area. The difference is irrelevant. The Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code section 30212. That section provides that new development does not include the demolition and reconstruction of a single-family residence if the reconstructed residence does not exceed either the floor area,

height or bulk of the former structure by more than 10 percent and the reconstructed residence is sited in the same location on the effected property as the former structure. The Nollans' proposed new single-family residence exceeds the floor area, the height and bulk of the former structure by more than 10 percent and is not sited in the same location as the former structure. It is, therefore, new development as was the residence in question in the *Grupe* case.

The Nollans contend that since there is public access one-quarter to one-third of a mile in one direction and 1800 feet in the other direction from their property, adequate access exists within the meaning of that section. Public Resources Code section 30212 requires public access to be provided in new development projects except, among other things, where adequate access exists nearby.

The Nollans' property lies in an area where numerous dedications for public access have been made on nearly all the beach front parcels. Furthermore, there is no access to tidelands and the sea directly in front of the Nollans' lot, except by tresspassing or boat at high tide. A limitation on the Commission from imposing lateral access in this case is contrary to the stated purpose of the Legislature in enacting the Coastal Act to provide maximum public access to and along the coast. The access in *Grupe* appears to be nearer to the landowners' property than in the instant case. This contention of the Nollans lacks merit.

The Nollans claim that since the Commission did not appeal when the superior court made its first order issuing a peremptory writ of mandate striking the condition, that order became the law of this case and that it is immune from collateral attack. Neither doctrine applies here.

When it issued its first peremptory writ, the trial court, among other things, remanded the proceedings to the

Commission for a public hearing. At the public hearing on remand a mass of evidence was presented to the Commission. The record was changed substantially. The original Commission decision was made in an administrative permit context and no findings were made, no evidence was in the record other than the application, submissions and the executive director's statement of reasons and no hearing was held. When a record is changed in any substantial respect the law of the case doctrine does not apply. (*Marsh v. Workmen's Comp. App. Bd.* (1968) 257 Cal.App.2d 574, 581 [65 Cal.Rptr. 69].)

The application of either the doctrine of law of the case or collateral estoppel here would result in a substantial injustice since the rulings of the trial court were made before *Remmenga* and *Grupe* were decided. Both of those decisions clarified the law on the subject of the right of the Commission to impose conditions on issuing permits for new development.

"It is fundamental that the point relied upon as law of the case must have been ***necessarily involved*** in the case. Accordingly, a *dictum* is not binding. . . ." (6 Witkin, Cal. Procedure (2d ed. 1971) § 647, p. 4564.) Having determined to remand the matter for an evidentiary and public hearing, the balance of the orders made by the court in its first peremptory writ were dicta and the doctrine of law of the case does not extend to dicta. (*Stockton Theatres Inc. v. Palermo* (1956) 47 Cal.2d 469, 474 [304 P.2d 7].)

The judgment is reversed and the matter remanded with directions to deny the petition for writ of mandate.

Stone, P.J., and Gilbert, J., concurred.

APPELLANT'S BRIEF

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF OF APPELLANTS

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

Appeal Docketed July 29, 1986
Probable Jurisdiction Noted October 20, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTIONS PRESENTED

1. Where the Nollans' proposal to rebuild their private residence on the same site as a previous house did not create the public's need to use the adjacent beach, does the requirement that they dedicate a public right-of-way across all of their private beach and allow the physical invasion of one-third of their property by the public at large constitute a "taking" under the Fifth and Fourteenth Amendments?

2. Where a state statute authorizes the exaction of a public right-of-way as a condition on the approval of a coastal development permit, must the state courts evaluate the facts of each case to determine whether the burdens imposed on the individual property owner would constitute a "taking" under the Fifth and Fourteenth Amendments?

PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the Court of Appeal of the State of California.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	iv
OPINIONS BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF ARGUMENT	12
ARGUMENT	15
I. THE PHYSICAL INVASION OF THE NOLLANS' PROPERTY IS THE TYPE OF INTRUSIVE GOVERNMENTAL ACTION WHICH THIS COURT HAS UNIFORMLY FOUND TO BE A TAKING	15
II. THE NOLLANS HAVE RECEIVED NO SPECIAL BENEFIT NOR CREATED ANY SPECIAL PUBLIC BURDEN TO JUSTIFY THE IMPOSITION ON THEM OF THE FULL COST OF EXPANDING A PUBLIC BEACH AREA	21
III. THE CALIFORNIA COURT OF APPEAL DID NOT APPLY A MEANINGFUL, FACTUAL ANALYSIS TO THE CLAIM OF THE NOLLANS THAT THE REQUIRED DEDICATION OF A PUBLIC RIGHT-OF-WAY VIOLATED THE TAKING CLAUSE	30
CONCLUSION	36
APPENDIX	A-1

TABLE OF AUTHORITIES CITED

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 29, 35, 36

Armstrong v. United States, 364 U.S. 40 (1960) 14, 29

Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California, 346 U.S. 346 (1953) 25

City of Gainesville v. Southern Railway Co., 423 F.2d 588 (5th Cir. 1970) 22, 27

Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986) 24

Georgia-Pacific Corp. v. California Coastal Commission, 132 Cal. App. 3d 678 (1982) 31, 32

Georgia Railway & Electric Co. v. City of Decatur, 295 U.S. 165 (1935) 23

Griggs v. County of Allegheny, 369 U.S. 84 (1962) 16, 19

Grupe v. California Coastal Commission, 166 Cal. App. 3d 148 (1985) 32, 33, 34

Heart of Atlanta Motel v. United States, 379 U.S. 241 (1964) 16

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264 (1981) 36

Kaiser Aetna v. United States, 444 U.S. 164 (1979) ..... *passim*

Kirby Forest Industries, Inc. v. United States, 467 U.S. 1 (1984) 20

TABLE OF AUTHORITIES CITED—Continued

Page

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 13, 15, 16, 19, 20

Lynch v. Household Finance Corp., 405 U.S. 538 (1972) 30

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 30

Myles Salt Co. v. Board of Commissioners, 239 U.S. 478 (1916) 23, 24

Nashville, Chattanooga, & St. Louis Railway v. Walters, 294 U.S. 405 (1935) 22, 24, 25

National Board of Young Men's Christian Associations v. United States, 395 U.S. 85 (1969) 26, 29

National Cable Television Association v. United States, 415 U.S. 336 (1974) 26

Norwood v. Baker, 172 U.S. 269 (1898) 23

Olson v. United States, 292 U.S. 246 (1934) 22

Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) 22, 27

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 14, 22, 29, 33, 34, 35

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 16, 29

Pumpelly v. Green Bay & Mississippi Canal Co., 80 U.S. (13 Wall.) 166 (1872) 15, 16

Remmenga v. California Coastal Commission, 163 Cal. App. 3d 623 (1985) 32, 33, 34

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 21

San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981) 29

Smyth v. Ames, 169 U.S. 466 (1898) 35

TABLE OF AUTHORITIES CITED—Continued

	Page
Southern Railway Co. v. City of Morristown, 332 F.Supp. 482 (E.D. Tenn. 1970)	27
United States v. Causby, 328 U.S. 256 (1946)	16, 19
United States v. Fuller, 409 U.S. 488 (1973)	29
United States v. Orito, 413 U.S. 139 (1973)	18
United States v. Pewee Coal Co., 341 U.S. 114 (1951)	16
United States v. 10.0 Acres, 535 F.2d 1092 (9th Cir. 1976)	22
United States v. 50 Acres of Land, 469 U.S. 24 (1984)	22
Vaughn v. Vermillion Corp., 444 U.S. 206 (1979)	28

STATUTES

Cal. Civ. Code § 654 (West 1982)	2, 21
Cal. Pub. Res. Code § 30000, et seq.	3
§ 30106	2, 3
§ 30212	2, 31
§ 30600(a)	2, 3
§ 30624	4

UNITED STATES CONSTITUTION

Fifth Amendment	2
Fourteenth Amendment	2

MISCELLANEOUS

D. Hagen & D. Miszynski, Windfalls for Wipeouts: Land Value Capture and Compensation (1978)	26

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF OF APPELLANTS

OPINIONS BELOW

The staff report adopted as the decision of the California Coastal Commission is unpublished. Joint Appendix (JA) at 41. The trial court twice invalidated the public use condition and issued two statements of decision which are unpublished. JA at 36 and 413. The opinion of the California Court of Appeal upholding the condition is reported at 177 Cal. App. 3d 719 (1986). JA at 421. The California Supreme Court denied review. Jurisdictional Statement, Appendix B.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(2). The application of a California state statute to the Nollans was challenged as violating the United States Constitution and the statute was upheld in an opinion by the California Court of Appeal which became final on April 30, 1986, when review was denied by the California Supreme Court. Notice of appeal to this Court was filed on May 14, 1986, and this appeal was docketed in this Court on July 29, 1986.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fifth Amendment to the United States Constitution:

> "[N]or shall private property be taken for public use, without just compensation."

Fourteenth Amendment to the United States Constitution:

> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California Public Resources Code §§ 30106, 30212, and 30600(a) (West 1986); California Civil Code § 654 (West 1982). The portions of these code sections which are involved in this case are set forth in the appendix to this brief.

———o———

STATEMENT OF THE CASE

The Nolians are owners of a parcel of land in a residential subdivision in Ventura County, California. The lot is small and has no unique or exceptional features except its location. It is located on the ocean at Faria Beach and the sandy beach area extends over one-third of the property. JA at 75-75b, 414. Because of its location the California Coastal Act[1] requires that any development[2] on the lot must be approved by both local authorities and the California Coastal Commission.[3]

For approximately 40 years the Nollan family had leased the property and used the old house on the lot for weekend and vacation use and for rental to others. JA at 309-10. When the Nollans decided to purchase the lot and rebuild the house to make their personal family residence there, they were obligated to apply for a coastal development permit from the commission. At the time their application was filed with the commission in 1982, the Nollans still held a lease with an option to buy the lot. JA at 14. The existing structure did not meet many current building, health, or safety standards. Abuse by renters and deterioration from natural elements left the building an eyesore in a neighborhood in the process of

---

1 Cal. Pub. Res. Code § 30000, *et seq.* All citations to the California Public Resources Code are to West's 1986.

2 California Public Resources Code § 30106 defines development in the most expansive terms, including "the placement or erection of any solid material or structure." This broad definition encompasses even routine, minor residential improvements such as building a deck or erecting a fence.

3 Cal. Pub. Res. Code § 30600(a).

renovation to attractive, moderate-size homes. JA at 302. The Nollans' option to buy required them to renovate or demolish and replace the existing house. JA at 310. The Nollans were under pressure from the owner of the property to satisfy the condition on the option so that escrow could close and the property transfer could be completed.[4] JA at 282-84, 401-03.

The issuance of the permit requested by the Nollans was a routine matter. They applied only to replace the old, dilapidated house with a moderate-size, new home on the same site.[5] Their proposal complied with all planning and zoning limitations on the property. The Nollans received an "administrative permit" from a staff official, JA at 31-35, which would be routinely validated as a consent item on the commission's agenda unless two of the members of the commission voted to set the permit for hearing. JA at 32.[6] Although the Nollans requested a hearing, the commission on April 17, 1982, routinely approved the Nollans' permit without a hearing, along with all other administrative permits on that agenda item. JA at 30.

---

[4] After winning this case in the trial court, the Nollans satisfied the condition, exercised their option to purchase the property, and constructed the new residence.

[5] The plot plan of the Nollans' lot including the 521 square foot "footprint" of the original house and the 1,236 square foot "footprint" of the new, two-story, 1,674 square foot house appears at JA at 75a.

[6] California Public Resources Code § 30624 has been amended to require a request by at least one-third of the appointed members of the commission to set an administrative permit for hearing.

The Nollans requested the hearing to ask the commission to remove the special condition allowing public use of their property which the staff had placed on the permit. JA at 23, 27-28. The condition stated:

> "Prior to the issuance of the Coastal Development Permit, the applicants shall record, in a form and manner approved by the Executive Director, a deed restriction acknowledging the right of the public to pass and repass across the subject properties in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other. In the event that any dispute should arise as to the interpretation of this condition, the matter shall be referred to the Commission for resolution." JA at 34.

Failure to comply with this condition would subject the Nollans to penalties under the California Coastal Act. JA at 32. The Nollans refused to make the required dedication unless they could reserve the right to have a court of competent jurisdiction determine whether the imposition of this obligation violated their constitutional rights. They gave the commission the required deed restriction but added a reservation of the right to challenge the validity of the dedication requirement. This deed restriction was rejected by the commission which insisted that the Nollans waive any legal challenge to the condition. JA at 390-93.

The content of the deed restriction required by the commission's executive director demonstrates the severity of the burden being imposed. A "public servitude" is created establishing a right-of-way for the public at large to use one-third of the total area of the lot which is the Nollans' personal residence. The personal use and enjoyment of the area by the Nollans is expressly subordinated to the public use. The Nollans are to "make no

use of that portion of the beach" which might interfere with use of the right-of-way being "conferred on the public." JA at 386-87.

After the commission approved the administrative permit, the Nollans initiated this legal challenge asking the trial court to set aside the dedication condition. JA at 328. The Nollans argued that a requirement of public use of their property violated their constitutional rights. The trial court agreed, concluding that the record before the commission did not demonstrate the required relationship between the dedication to public use being required from the Nollans and their proposal to reconstruct the house on their property. The trial court's findings include:

1. The Nollans are being required to "dedicate the entire beach, approximately one-third of the property." JA at 37.

2. The Nollans "are not building a single-family residence on a vacant lot but rather are replacing a single-family residence with another single-family residence." JA at 38.

3. The Nollans "are not changing the use of the property." *Id.*

4. "It does not appear that this replacement home is out of character with the other houses in the area." *Id.*

5. "[T]he record does not show at this time that [the new home's] placement on existing residential private property will burden the public's otherwise available access to the beach." *Id.*

The trial court remanded the case to the commission to conduct "a full evidentiary hearing" on the dedication issue. JA at 40. The commission accepted the remand and set a hearing on the Nollans' permit application. The staff report adopted by the commission describes the new "evidence" which is purported to address the relationship between the Nollans' replacement home and the requirement that they dedicate a public right-of-way along Faria Beach in front of their property.[7] JA at 42-43. None of these materials identifies any effect of the Nollans' project which could create a public need for more public beach or otherwise identifies any relationship between the replacement of the Nollans' home and the exaction of the right-of-way.

---

[7] The opinion of the Court of Appeal summarizes this evidence.

1. "Reports on 12 permits for demolition and reconstruction of single-family residences [on other lots] in the Faria Beach tract and four other permits."

2. "[S]tatewide interpretative guidelines [issued by the commission] on access."

3. "[A] Ventura beach study."

4. "[A] report on an investigation of the existence of public rights acquired through implied dedication at Faria, including declarations of surfers who frequent Faria beach."

5. "[E]xcerpts from surfing publications about the area."

6. "[A] commission study on coastal access in San Diego."

7. "[A] study of cumulative impact on shore-zoned development at Lake Tahoe."

8. "[A] hand book on coastal recreation for planners."

9. "[T]hree articles on coastal access problems encountered in other states."

10. "[A] beach user study component of the Santa Monica Land Use Plan." JA at 423-24.

The same is true of the 12 pages of "FINDINGS AND DECLARATIONS" adopted by the commission on the subject of "Public Access." There is no connection between the effects of the specific project proposed by the Nollans and the required dedication of a public right-of-way along Faria Beach. JA at 51-68. Initially the commission determined that the Nollans' project was "new development" and that the Public Resources Code, the commission's guidelines,[8] and the Ventura County land use plan required an access dedication from all new development.

The only findings on the Nollans' house itself are that it will be larger[9] and that it will be used as a permanent residence rather than a beach rental. JA at 56-60.

---

[8] The commission's guidelines which are not quoted in the findings state:

> "Thus, based upon the historical evidence that development along the California coast results in many different ways in the preclusion of public use of the state-owned tidelands, based on the same conclusions by the Commission in adopting the Coastal Plan, and based upon the legislative expressions in both the 1972 and 1976 Coastal Acts, the Commission concludes that all new development projects cause a sufficient burden on public access to warrant the imposition of access conditions as a condition to development, subject only to the exceptions specified by the Legislature." JA at 359-60.

[9] Figures presented by the commission's staff for lot size and lot coverage are erroneous. Although the architect described the lot area to be 2,800 square feet, JA at 23a, that figure relates only to the building site above the existing seawall. The full lot size, including the beach area, is 3,800 square

(Continued)

The report then discussed the generalized impact of building on formerly undeveloped land, but mentioned nothing which indicated that the Nollans' project had an effect on public use along the beach. To the contrary the commission found that as a result of the change from vacation rental to permanent residence of the Nollan family "a reduction in use would occur if occupancy were to be permanently limited to four individuals." JA at 60. The commission concluded that other, *existing* circumstances had affected access:

> "The commission finds the applicant's lot is located along a unique stretch of coast where lateral public access in [*sic*] inadequate due to the construction of private residential structures and shoreline protective devices along a fluctuating shoreline. At times the wet sandy beach extends up to both the applicant's and other residents' existing seawalls, preventing pedestrian passage when the tide is in. Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract applicants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment. The Commission therefore finds that, pursuant to the public access

---

feet. *See* JA at 26 (plot plan), 397 (declaration of James Nollan). The true lot coverage by the new house and garage is 1,236 square feet, not 2,464 square feet. *See* JA at 23a (architect's letter), 26 (plot plan), 397 (declaration of James Nollan). Although these errors were brought to the commission's attention by Mr. Nollan, JA at 397, in the report adopted by the commission only the general reference to lot coverage increasing "by nearly five times" was deleted. *Compare* JA at 597 *to* JA at 56. The incorrect numbers were not changed to reflect the true facts.

> policies and specifically Section 30212(a), that adequate public access does not exist nearby and a deed restriction offer to allow the public pass and re-pass rights is consistent with both past Commission action and with the site's ability to provide such access." JA at 68.

Thus, the commission's findings related to the geographical location of the Nollans' lot and the state's desire to own more public beach in that area and did not identify any effect on public use from the reconstruction of the Nollans' house. Nonetheless, the commission again approved the permit with the same deed restriction requiring public use of the Nollans' property.

The Nollans renewed this challenge in the trial court on July 15, 1983. The supplemental petition again requested the court to set aside the special condition allowing public use of their property on the basis that the commission had violated the Nollans' constitutional rights "by placing an access condition on the approval of petitioners' permit, which condition bears no reasonable relationship to any asserted burden created by the proposed home and constitutes a taking of private property for public use in violation of the Fifth and Fourteenth Amendments of the United States Constitution . . . ." JA at 343. The trial court, again holding for the Nollans, restated the legal standard that the commission could not require the dedication unless it could "make an evidentiary showing of direct and definable adverse impact on the public access which should either demonstrate immediate impact or verifiable, nonspeculative, cumulative impact." JA at 416. Applying this legal standard, the trial court found that the commission's new evidence was "either not specific to the Nollan property or too speculative in nature

to support a finding that this project, by these petitioners, will create a direct or cumulative burden on public access to the sea" and that "the record did not support a finding that petitioners' proposed development would burden the public." JA at 417. On February 15, 1984, the trial court entered judgment striking the special condition from the permit. JA at 412.

On appeal the findings of the trial court were not disturbed. The Court of Appeal agreed that "[h]ere the Nollans' project has not created a need for access to the tidelands fronting on their property." JA at 425. However, the appellate court ruled that the trial court had applied an incorrect legal standard:

> "The trial court found that the evidence did not support a finding that the Nollans' project would create a 'direct or cumulative burden on public access to the sea.' Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error." JA at 424.

The Court of Appeal emphasized that "the justification for required dedication is not limited to the needs of or burdens created by the project." JA at 425. The appellate court then concluded that the action by the commission should be upheld because "[t]he Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code Section 30212." JA at 425. There was no analysis of the specific facts of this case to determine whether the application of the statutory access requirement to the Nollans would result in the taking of their property for public use in violation of the Fifth and Fourteenth Amendments. The opinion of the Court of Appeal was filed on

January 24, 1986, and the California Supreme Court denied review on April 30, 1986. Timely appeal was docketed in this Court on July 29, 1986. Probable jurisdiction was noted on October 20, 1986.

———o———

SUMMARY OF ARGUMENT

The Nollans and the commission are locked in a dispute over what obligations rest on the state when it decides to open the yard of a private residence for use as a public right-of-way. The Nollans contend that the state cannot impose an exaction on them in the form of this physical invasion unless it either (1) condemns the right-of-way and pays just compensation, or (2) demonstrates that the need for the public right-of-way directly results from the action the Nollans proposed to take to rebuild the house on their lot. The commission contends that regardless of the reasons for the Nollans' application it is always free to require the dedication of the right-of-way as long as it will contribute to the implementation of the public policies reflected in the California Coastal Act. The commission's contention places directly upon the shoulders of the Nollans, as coastal property owners, the full cost of public benefits derived from enhancing public use areas along the beach. That result cannot be squared with the guarantees of the Fifth and Fourteenth Amendments as interpreted by this Court's decisions ruling on physical invasions and the imposition of other special costs on property owners.

The Nollans are being subjected to the most severe form of deprivation short of formal expropriation. They are being required to dedicate a public right-of-way across a large portion of their property to allow repeated physical invasions of the yard of their personal residence by the public at large. This requirement by the commission that the Nollans dedicate their property to public use results in the type of physical invasion which this Court has uniformly found to constitute a "taking" in violation of the Fifth and Fourteenth Amendments. The invasion of the small, residential lot in this case presents more severe effects on the property owner than were present in the invasion of the recreational marina in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979). In this case the regular physical invasions by members of the public are combined with a permanent, legal displacement of the Nollans by a deed restriction which subordinates their interests to the public use. The resulting effect on the Nollans is qualitatively more severe than the permanent, physical occupation found to be a taking in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The precedents of this Court holding physical invasions to be "takings" control this case.

The Nollans' request to rebuild their residence on the site of their former beach house provides no justification for the state to require them to dedicate a portion of their property to a public right-of-way and to open their residential parcel to physical invasions by the public at large. Their action created no change in use of the parcel and complied in all ways with all use restrictions imposed on the property. The commission has shown no relationship to exist between the Nollans' request to rebuild their

house and the required dedication of a public right-of-way. The trial court's undisturbed findings show that any public need which might exist was there before the Nollans requested to rebuild their home and their actions did not disturb previously existing public access in the area. This Court has repeatedly noted that the underlying purpose of the Taking Clause is to ensure that some persons alone are not required to bear fully the cost of public benefits which in all fairness and justice should be borne by the public as a whole. *See, e.g., Armstrong v. United States,* 364 U.S. 40, 49 (1960); *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123 (1978). Under the circumstances of this case, where the Nollans' action has not created the need for the public right-of-way and they receive no special benefits from it, they are being unfairly required to bear the full costs of providing an enlarged beach area for general public use.

This Court has established a two-step analysis to determine the constitutional validity under the Taking Clause of an obligation imposed on a property owner pursuant to a statutory mandate. *Penn Central,* 438 U.S. at 135-36. The first step is to ensure that the statute is a valid grant of authority and jurisdiction to the governmental agency. If the statute is valid, it is necessary to conduct an "ad hoc, factual inquir[y]" to determine whether the interference with the particular property owners' interest is of such a magnitude that compensation is required. *Kaiser Aetna,* 444 U.S. at 175. The California Court of Appeal erred by completing only the first step of the required analysis. It concluded that the statute required the dedication ordered by the commission and that the interests of the Nollans beyond that point were irrelevant.

The failure of the Court of Appeal to give an appropriate, factual analysis of the burdens being imposed on the Nollans denied them any meaningful consideration of whether the dedication condition constituted a "taking" in violation of the Fifth and Fourteenth Amendments.

———o———

ARGUMENT

I

THE PHYSICAL INVASION OF THE NOLLANS' PROPERTY IS THE TYPE OF INTRUSIVE GOVERNMENTAL ACTION WHICH THIS COURT HAS UNIFORMLY FOUND TO BE A TAKING

Since *Pumpelly v. Green Bay & Mississippi Canal Co.,* 80 U.S. (13 Wall.) 166 (1872), this Court has ruled without exception that involuntary physical invasions of privately owned real property caused by the government or by third parties under government authorization constitute "takings" under the Fifth and Fourteenth Amendments. The uniformity of these rulings was acknowledged in *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419.

> "Professor Michelman has accurately summarized the case law concerning the role of the concept of physical invasions in the development of takings jurisprudence:
>
> "'At one time it was commonly held that, in the absence of explicit expropriation, a compensable "taking" could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny

compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space or a thing which theretofore was understood to be under private ownership.' Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of 'Just Compensation' Law, 80 Harv L Rev 1165, 1184 (1967) (emphasis in original; footnotes omitted)." 458 U.S. at 427 n.5.

These physical invasion cases have involved a variety of factual circumstances including the placement of inanimate things, *Loretto, supra* (boxes and cables); *Pumpelly, supra* (water), the physical takeover and operation by other persons, *United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (seizure and direction of operation of coal mine), and authorization of repeated passage across the property, *Kaiser Aetna, supra* (public access to marina); *Griggs v. County of Allegheny*, 369 U.S. 84 (1962) (airplane overflights); *United States v. Causby*, 328 U.S. 256 (1946) (airplane overflights). Differences in the nature of the physical invasion have not affected the result. The Nollans present a particularly egregious example of a case of this type.[10]

---

[10] This line of cases is to be distinguished from those cases where the property owner has voluntarily opened the property to general public use for commercial purposes and the government requirement being imposed is limited to regulating the relationship between the property owner and his invitees. *Compare, e.g., Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980) (state law requiring individuals be allowed to distribute pamphlets and circulate petition in shopping center); *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964) (federal law prohibiting discrimination based on race in the renting of motel accommodations).

The facts of the Nollans' situation present a near perfect match with *Kaiser Aetna, supra*. Both cases arose in the context of a government regulation and permit program. Both parcels of private property abut areas subject to the navigational servitude. The government agency in each case imposed the requirement of allowing physical invasion by the public at large of a portion of the private property for the purpose of enhancing the public use of the adjacent public area. After reviewing the historical development of the law in similar cases the Court in *Kaiser Aetna* concluded that the government action in requiring an open public right-of-way under the circumstances went "so far beyond ordinary regulation," 444 U.S. at 178, that it fell into a category in which it has never been doubted that the government "was required by the Eminent Domain Clause of the Fifth Amendment to condemn and pay fair value for that interest." 444 U.S. at 177. To reach a contrary result in this case the Court would have to overrule *Kaiser Aetna*, a case decided only seven years ago.

To the extent that there are factual differences between these two cases those differences demonstrate that the burdens imposed on the Nollans by the California Coastal Commission substantially exceed the burden imposed on Kaiser Aetna by the Corps of Engineers. One important distinction is the difference in the nature of the properties involved. The Nollans' property is their personal family residence. The property in *Kaiser Aetna* was the Hawaii Kai Marina, an area set aside for nondomestic use. The use of the marina was not limited only to residential property owners in the area. Marina shopping center merchants used a ferry, the Marina Queen, to

attract shoppers to their stores and real estate agents ferried potential buyers into the marina to promote the sale of marina lots. *Kaiser Aetna*, 444 U.S. at 168. This Court has long recognized that "[t]he constitution extends special safeguards to the privacy of the home." *United States v. Orito*, 413 U.S. 139, 142 (1973). The order of the commission that the public be allowed to make use of one-third of the area of the Nollans' small, residential parcel transgresses any reasonable protection of the privacy of their home.

Another distinction is the compatibility of the private use with the ordered public use. The intended private use of the open area of the Hawaii Kai Marina was navigational use by a large number of persons and boats. The public use demanded by the Corps of Engineers was the same use, just more of it. In contrast a public right-of-way is incompatible with the domestic, residential purpose of the Nollans' small lot. While the private users in *Kaiser Aetna* could continue to use the marina in much the same way even with the public use, the Nollans will be forced to withdraw their residential use to the area behind the line drawn by the commission.

The third significant distinction which indicates a greater burden on the Nollans is the commission's requirement that they take an affirmative act to create a public right-of-way which did not previously exist. In *Kaiser Aetna* the Corps of Engineers argued that the navigational servitude had been extended across Hawaii Kai Marina by operation of law. The corps was seeking to prevent Kaiser Aetna from interfering with a public right-of-way which the corps claimed already existed. By

comparison the coastal commission did not base its order on a finding that a public right to use the Nollans' property already existed. To the extent any such possibility was recognized the commission expressly reserved that matter for future consideration. JA at 45, 47. Instead the commission imposed an affirmative duty on the Nollans to create a previously nonexistent public right-of-way by recording a deed restriction in their chain of title. This affirmative duty moves the facts of this case toward the type of physical intrusion invalidated by this Court in *Loretto, supra.*

In *Loretto* this Court ruled that "a permanent physical occupation" is always a taking. The intrusion on the Nollans is a physical invasion far in excess of the placement of small, inanimate objects which occurred in *Loretto.* The box and cables affixed to the side of Mrs. Loretto's building did not impose maintenance and behavior problems and did not open the door to property damage and public liability claims, all of which face the Nollans.

The permanent physical occupation was found to be objectionable in *Loretto* because of its effect in displacing the owner. "Property rights in a physical thing have been described as the rights 'to possess, use and dispose of it.' To the extent that the government permanently occupies physical property it effectively destroys *each* of these rights." 458 U.S. at 435 (emphasis in original; citation omitted). In this case, as in *Causby, supra,* and *Griggs, supra,* the repetitious physical invasions by members of the public only physically displace the Nollans during actual occupancy; however, the required deed restriction works a legal displacement of the Nollans which is both

permanent and continuous. While the occupation in *Loretto* could end (458 U.S. at 439 n.17) the displacement of the Nollans is to be everlasting, "running with the land." JA at 388. Unlike any other land use regulation case decided by this Court in this case the owners are being required to execute and record in their chain of title a deed restriction granting without compensation a property interest "free of prior liens except tax liens." JA at 46. This affirmative obligation will create a public right-of-way over their residential property which will obligate the Nollans *at all times* to "make no use of that portion of the beach" which might obstruct the open public right-of-way. JA at 387. Thus, the Nollans could not implant a barbeque, bench, or picnic table, nor could they park a sailboat on or string a volleyball net across their beach area. JA at 396. The combination of the repeated physical invasion by members of the public with the permanent, continuous legal displacement of the Nollans creates an interference with the Nollans' use and enjoyment of their property of such a magnitude that it exceeds the permanent physical occupation found invalid in *Loretto*.

These precedents control this case. The burdens being imposed on the Nollans are as intrusive and severe as the impositions uniformly found by this Court in these prior cases to be "takings." The express purpose of the affirmative obligation put on the Nollans is to expand the area of public use adjacent to the public tidelands. Obligations of this type "can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." *Kirby Forest Industries, Inc. v. United States*, 467 U.S. 1, 14 (1984).

II

THE NOLLANS HAVE RECEIVED NO SPECIAL BENEFIT NOR CREATED ANY SPECIAL PUBLIC BURDEN TO JUSTIFY THE IMPOSITION ON THEM OF THE FULL COST OF EXPANDING A PUBLIC BEACH AREA

Since the Nollans acknowledge that the state could condemn their property to create a public beach, the dispute between them and the commission is limited to the method being used. The state's policy is to confiscate the property it desires from individual coastal property owners through dedication requirements in coastal development permits. JA at 359-60. The Nollans contend that the facts of their case provide no justification for them to be singled out to bear a particularly onerous burden, which in fairness should be borne by the public at large.

Under the required deed restriction the Nollans not only must allow a physical invasion of their property by the public, they must also give the public a right of use which is superior to any residual rights they retain. JA at 357. This Court has recognized that "[t]he right to exclude others is generally 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1101 (1984) (citing *Kaiser Aetna*, 444 U.S. at 176). This principle is recognized in California property law where property is defined by "the right of one or more persons to possess and use it *to the exclusion of others.*" Cal. Civ. Code § 654 (West 1982) (emphasis added). Therefore, the exceptional loss being suffered by

the Nollans is "sufficiently important" to them that it falls into that category of interests which "the Government must condemn and pay for." *Kaiser Aetna,* 444 U.S. at 179-80; *United States v. 10.0 Acres,* 535 F.2d 1092, 1094 (9th Cir. 1976). If the state were formally to establish Faria Beach as a public beach, there can be no question that it would have to condemn the beach area of the Nollans' property and pay to them market value for it. *United States v. 50 Acres of Land,* 469 U.S. 24, 29 (1984); *Olson v. United States,* 292 U.S. 246, 254-55 (1934). Nothing in the facts of this case justifies the establishment of an informal state beach by using a permit condition to avoid the government's constitutionally mandated obligation to condemn and pay for what it wants.

The furthest this Court has gone in finding that the facts of a particular case justify a special burden imposed on the owners of property is the use of a rule of reason in cases involving fees and assessments. Those cases have acknowledged that in some instances the government, when taking property, may be merely responding to a public need created by the owner, or providing the owners' other property with a special benefit. The rule of reason as applied in those cases allows the government to impose special costs on property owners in proportion to special benefits being received by the owner, or to public burdens created by the owner. *See, e.g., Penn Central,* 438 U.S. at 148 n.11 (Rehnquist, J., dissenting); *Nashville, Chattanooga, & St. Louis Railway v. Walters,* 294 U.S. 405, 429 (1935); *Parks v. Watson,* 716 F.2d 646, 652-53 (9th Cir. 1983); *City of Gainesville v. Southern Railway Co.,* 423 F.2d 588, 591 (5th Cir. 1970). This rule

has evolved over many years of consideration by this Court of different obligations imposed on property owners.

In the early case of *Norwood v. Baker,* 172 U.S. 269 (1898), the Village of Norwood condemned a strip of land through the center of a single parcel for the purpose of constructing a road, and then assessed the owner for the full costs of the condemnation. The owner sued, contending that the assessment was not in proportion to any benefits received by her; rather, the condemnation was intended to connect two roads abutting her property for public convenience. This Court agreed, and wrote:

> "In our judgment the exaction from the owner of private property of the cost of a public improvement in substantial excess of the special benefits accruing to him is, *to the extent of such excess,* a taking, under the guise of taxation, of private property for public use without compensation." 172 U.S. at 279 (emphasis in original).

Norwood was a landmark case, standing for the proposition that such special burdens on a property owner are permissible only to the extent that the owner derives special benefits from the government's action. The special benefits are, in effect, a form of just compensation. *Norwood* was followed in other cases decided by this Court, *see, e.g., Georgia Railway & Electric Co. v. City of Decatur,* 295 U.S. 165, 170 (1935) ("if the burden imposed is without any compensating advantage . . . the assessment amounts to confiscation"); *Myles Salt Co. v. Board of Commissioners,* 239 U.S. 478, 483 (1916) (it is unconstitutional to include property in a drainage district "solely and only for the purpose of deriving revenue therefrom

. . . without any benefit to plaintiffs or its property whatever''), and is still recognized as good law today, *see, e.g., Furey v. City of Sacramento*, 780 F.2d 1448, 1454 (9th Cir. 1986) (''government may not force a landowner to make an improvement that, while valuable to others, is useless to him'').

In *Nashville, Chattanooga, & St. Louis Railway v. Walters, supra*, this Court addressed a Tennessee statute which authorized the state highway commission to construct a highway underpass at locations where a state highway crossed a railroad track. The statute imposed upon the railroad company in every case one-half of the costs of constructing the underpass. 294 U.S. at 412.

> ''While the Railway, the sufferer from the construction of the new highway, is burdened with one-half the costs of the underpass, the owners of trucks and busses and others, who are beneficiaries of its construction, are immune from making any direct contribution toward the cost. . . .
>
> . . . .
>
> ''The promotion of public convenience will not justify requiring of a railroad, any more than of others, the expenditure of money, *unless it can be shown that a duty to provide the particular convenience rests upon it.*
>
> ''It is true that the police power embraces regulations designed to promote public convenience or the general welfare . . . . But when particular individuals

> are singled out to bear the costs of advancing the public convenience, *that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.*'' *Id.* at 427-29 (emphasis added; citations omitted).

Thus, *Nashville* established that the burden must be justified by showing either that the property owners are receiving a special benefit, or that they owe a ''duty to provide the particular convenience,'' by having created the ''evils to be eradicated.'' This rule was confirmed in *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California*, 346 U.S. 346 (1953), where the railroad was being required to pay half the cost of replacing certain underpasses because they were deteriorated and undersized. 346 U.S. at 349. This Court wrote:

> ''It was not an arbitrary exercise of power by the Commission to refuse to allocate costs on the basis of benefits alone. The railroad tracks are in the streets not as a matter of right but by permission from the State or its subdivisions. The presence of these tracks in the streets creates the burden of constructing grade separations in the interest of public safety and convenience. Having brought about the problem, the railroads are in no position to complain because their share in the cost of alleviating it is not based solely on the special benefits accruing to them from the improvements.'' 346 U.S. at 353.

Thus, this Court has allowed the imposition of special costs on property owners only when the government can show special benefits to the property or special public needs caused by the property owners. In no case has this Court sanctioned the conscription of private property to

meet public needs unrelated to any harm the owners have done or advantage they will receive.

This rule of reason is not limited to assessments for public works projects. *National Cable Television Association v. United States*, 415 U.S. 336, 340-42 (1974) (regulatory fees must be rationally related to a special benefit bestowed upon the applicant, or the agency's direct costs of regulating the applicant); *National Board of Young Men's Christian Associations v. United States*, 395 U.S. 85, 92 (1969) (destruction by rioters of troop-occupied building not a taking where "the private party is the particular intended beneficiary of the governmental activity"). Nor is the occurrence of uncompensated exactions found only in assessments for public works projects.

> "Local governments . . . are increasingly allocating . . . infrastructure costs to the new development. Special assessments were the earliest method of imposing these costs. Currently, it is more popular to impose exactions on developers, by specifying conditions which must be met before development permission . . . is granted." D. Hagan & D. Miszcynski, *Windfalls for Wipeouts: Land Value Capture and Compensation* 342 (1978) (footnote omitted).

Thus, the exaction of property interests such as that imposed on the Nollans is now recognized as an alternative method of imposing a special assessment. In that context the rule of reason described by the Court has been followed by the lower federal courts and by most state courts which have passed on the issue.[11] For example, in a recent Ninth Circuit decision involving facts analogous to the

---

[11] For a review of the many state courts that have recognized some form of the above rule, see the brief of the National Association of Home Builders as amicus curiae in support of appellants.

Nollans' case, *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), property owners, in order to develop certain property they owned, needed the vacation of platted city streets on the property. The owners petitioned the city to vacate the platted streets. In return, as a condition for vacating the roads, the city asked the owners to dedicate to the city a part of the property which contained two valuable geothermal wells. The court ruled that although the public interest might be served by the city gaining ownership of the geothermal wells, that fact was not enough to authorize the city to demand them from their owner as a condition of doing something unrelated to the wells.

> "Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forego a constitutional right [the right to be compensated when private property is taken for public use] is unlawful if the condition is not rationally related to the benefit conferred." 716 F.2d at 652.
>
> "Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation. . . . The condition violates the fifth amendment." 716 F.2d at 653.

For other recent examples of decisions adhering to this rule in the federal courts, consider *City of Gainesville v. Southern Railway Co., supra*, and *Southern Railway Co. v. City of Morristown*, 332 F.Supp. 482 (E.D. Tenn. 1970).

Kaiser Aetna, supra, and *Vaughn v. Vermillion Corp.*, 444 U.S. 206 (1979), are recent cases in which this Court has emphasized the importance of the relationship between the owners' actions and the public burden being imposed on them. Reviewing circumstances similar to those of this case, the Court distinguished actions which might "have impaired navigation" or caused "destruction of a pre-existing natural navigable waterway" from actions on private property with no such effect on public use. The Court indicated in both cases that while the former actions might justify the imposition of special obligations on the property owner, the latter clearly do not. *Kaiser Aetna* 444 U.S. at 179-80; *Vaughn,* 444 U.S. at 208-09.

The replacement of one house with another on the Nollans' property occurs entirely within the boundaries of their private property, JA at 26, 394, and will not impair or destroy in any way any manner of use by the general public of the adjacent public tidelands area. The record below and the undisturbed findings of the trial court establish that access along the beach is not affected by the new house. JA at 37. The Nollans have created no burdens on access to or use of the beach or otherwise caused the need for the public right-of-way.

Similarly, the Nollans benefit in no way from the expanded area of public use. They already have full access to and use of the beach, bought and paid for when they purchased their property. The effects of the dedication requirement on them are all negative. They lose the enjoyment, the privacy, and the security of a private beach area. The public gets the use; the Nollans get to clean up and bear the costs.

The reconstruction of the house and the requirement of the dedication are independent acts. The Nollans must pay with their property not because of any harmful thing they are doing or any beneficial thing they will receive, but because they own the property which the commission "had counted on . . . for continuity" and to establish "fluid access" up and down the coast. JA at 326. They are caught in the middle of "a comprehensive program to provide continuous public access along Faria Beach." JA at 68. The imposition of this special cost which has no reasonable relationship to any benefit received or burden created by the Nollans violates basic principles of fairness.

> "The constitutional requirement of just compensation derives as much content from the basic equitable principles of fairness . . . as it does from technical concepts of property law." *United States v. Fuller,* 409 U.S. 488, 490 (1973) (citation omitted).

This Court has stated on many occasions that the Constitution's guaranty against uncompensated takings was intended "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. at 49; *see also San Diego Gas & Electric Co. v. San Diego,* 450 U.S. 621, 656 (1981) (Brennan, J., dissenting); *Pruneyard,* 447 U.S. at 83; *Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980); *Penn Central,* 438 U.S. at 123; *National Board of Young Men's Christian Associations,* 395 U.S. at 89.

The Nollans should be no exception. Their fair share of the cost of providing the general public with an expanded beach area is no more than that of any other

member of the public at large. The trial court correctly invalidated the commission's order for requiring them to "surrender[] to the public something more and different from that which is exacted from other members of the public." *Monongahela Navigation Co. v. United States,* 148 U.S. 312, 325 (1893).

III

THE CALIFORNIA COURT OF APPEAL DID NOT APPLY A MEANINGFUL, FACTUAL ANALYSIS TO THE CLAIM OF THE NOLLANS THAT THE REQUIRED DEDICATION OF A PUBLIC RIGHT-OF-WAY VIOLATED THE TAKING CLAUSE

It is well established that "property rights" are fundamental civil rights of the individual owners. *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972). Yet, a particularly disturbing aspect of the decision of the Court of Appeal is the failure to discuss in any way the effect of the commission's order on the Nollans. The Nollans are recognized only as applicants in the state permit process—as something being processed through the bureaucratic mill. There is no recognition of their individual interest in retaining full enjoyment of their property and not allowing the public at large open access to the yard of their personal residence. The burdens suffered by the Nollans were irrelevant to the considerations of the government agency which assumed control over their lives. The Nollans were characterized as being "one more brick in the wall" interfering with the state's desire to enhance the use of the coastal area by the people of California. JA at 425. They were indeed treated like just another brick.

In refusing to consider the individual effects on the Nollans the Court of Appeal was applying the law in California, developed in previous cases, that Public Resources Code § 30212 required a mechanical exaction of a public right-of-way from coastal development permit applicants without regard to the factual circumstances of individual projects. The commission itself adopted this interpretation as its policy in its public access guidelines. JA at 359-60. The California courts approved this interpretation starting with *Georgia-Pacific Corp. v. California Coastal Commission,* 132 Cal. App. 3d 678 (1982).

In *Georgia-Pacific* a lumber company applied for coastal development permits to make certain improvements to its lumber mill property on the north coast of California including the construction of a visitor service facility, parking lot, helicopter pad, hangar, and related outbuildings. The commission conditioned the permits, requiring the company to dedicate specified easements to the public for access to and along the shoreline. The trial court struck the conditions, ruling that

> "the public access conditions imposed by the Commission . . . violate Article 1, Section 19 of the California Constitution and the Fifth and Fourteenth Amendments to the United States Constitution, because the conditions deprive Georgia-Pacific of private property without due process of law and without just compensation, in that the scope and extent of the easements required to be dedicated by said conditions are not reasonably related to the nature and impact of the four projects proposed by Georgia-Pacific." 132 Cal. App. 3d at 689 n.7.

The Court of Appeal reversed the trial court and recited the rule that would eventually be applied to the Nollans:

> "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it. (*Associated Home Builders, etc., Inc. v. City of Walnut Creek* (1971) 4 Cal.3d 633, 638-640 . . . .) The 'scope and extent' of the easements required by the Commission were 'reasonably related' to one of the principal objectives of the Coastal Act, which is to provide for maximum access to the coast by all the people of this State. (See § 30001.5, subd. (c).) Their relationship to the 'nature and impact' of the proposed projects was not a valid basis for the trial court's determination that the access conditions deprived Georgia-Pacific of its constitutional rights." 132 Cal. App. 3d at 699.

This language from *Georgia-Pacific* has been cited and followed in subsequent cases involving private individuals wishing to do nothing more than construct one single-family home on their one lot. *See, e.g., Remmenga v. California Coastal Commission*, 163 Cal. App. 3d 623, 628-29 (1985); *Grupe v. California Coastal Commission*, 166 Cal. App. 3d 148, 166 (1985). In *Grupe*, the court said that it would still require a finding that the applicant's project contributed "at least in an incidental manner" to the public need for more public beach. *Id.* at 166 n.11. It then found that Grupe's project sufficiently contributed to the public need because the project involved

new development on a previously vacant, private lot. *Id.* at 167.

The Court of Appeal, in the case at bar, found *Remmenga* and *Grupe* controlling, *except* to the extent that *Grupe* required more than just a simple showing that the exaction advances the purposes of the Coastal Act.

> "The cases of *Remmenga* and *Grupe* are dispositive here and require affirmation of the Commission's decision.
>
> "This case and *Grupe* differ in that *Grupe* involved construction of a residence on one of the few remaining vacant lots in the area. The difference is irrelevant. The Commission found the Nollan project to be a new development. This finding was required by the provisions of Public Resources Code section 30212. . . .
>
> ". . . Public Resources Code section 30212 requires public access to be provided in new development projects . . . ." 177 Cal. App. 3d at 723-24, JA at 425-26.

Thus, the Court of Appeal ruled that the only relevant inquiry is whether the project is "new development" as that term is used in the Coastal Act. The inquiry ends there; it is "irrelevant" that the project makes no change in the use of the property and has no effect on existing public access. No factual inquiry into the specific effects on the property owner is necessary.

This Court has directed a different course. In *Penn Central, supra,* a two-step analysis is set forth to determine the constitutional validity under the Taking Clause of an obligation on property imposed pursuant to a statutory mandate. That analysis requires a full, factual consideration of the effects on the individual property owner.

> "Rejection of appellants' broad arguments is not, however, the end of our inquiry, for all we thus far have

established is that the New York City law is not rendered invalid by its failure to provide 'just compensation' whenever a landmark owner is restricted in the exploitation of property interests, such as air rights, to a greater extent than provided for under applicable zoning laws. We now consider whether the interference with appellants' property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central*, 438 U.S. at 135-36.

The trial court followed the course set by this Court and conducted a factual inquiry to determine whether the nature and extent of the obligations imposed on the Nollans could be justified by any "direct and definable adverse impact on public access" from the Nollans' actions. JA at 415-16. After careful review of the record the trial court concluded that "the record does not support a finding that petitioners' project would burden public access." JA at 419. The Court of Appeal did not disturb these findings. It expressly agreed that "the Nollans' project has not created the need for access to the tidelands fronting on their property." JA at 425. While confirming the factual findings the Court of Appeal rejected the legal principle that it was necessary to consider the facts of the case to identify a direct relationship:

> "Since a direct burden on public access need not be demonstrated, we hold the trial court ruling to be in error." JA at 424.

Instead of analyzing the facts of the Nollans' case the Court of Appeal simply followed *Grupe* and *Remmenga* which the court concluded had established as California law that "the justification for required dedication is not limited to the needs of or burdens created by the project."

JA at 425. The court refused to recognize its obligation to determine "whether the interference with [the Nollans'] property is of such a magnitude that 'there must be an exercise of eminent domain and compensation to sustain [it].'" *Penn Central*, 438 U.S. at 136.

By analyzing only the statutory authorization of power the Court of Appeal failed to fulfill its judicial obligation to ensure that the commission in the use of its authority had complied with its responsibility to protect the individual rights of the Nollans.

> "It has always been a part of the judicial function to determine whether the act of one party (whether that party be a single individual, an organized body, or the public as a whole) operates to devest the other party of any rights of person or property. . . . [T]he 14th Amendment . . . forbids legislation, in whatever form it may be enacted, by which the property of one individual is, without compensation, wrested from him for the benefit of another, or of the public. This, as has been often observed, is a government of law, and not a government of men, and it must never be forgotten that under such a government, with its constitutional limitations and guarantees, the forms of law and the machinery of government, with all their reach and power, must in their actual workings stop on the hither side of the unnecessary and uncompensated taking or destruction of any private property, legally acquired and legally held." *Smyth v. Ames*, 169 U.S. 466, 524-25 (1898).

This Court has made quite clear that the mere existence of valid regulatory jurisdiction over a property owner does not preclude the possibility of a "taking." Establishing a valid statutory grant of jurisdiction is a threshold question. *Penn Central*, 438 U.S. at 135-36; *Agins*, 447 U.S. at 260.

Once valid jurisdiction is established, however, this Court "has examined the 'taking' question by engaging in essentially ad hoc, factual inquiries." *Kaiser Aetna*, 444 U.S. at 175. "These 'ad hoc, factual inquiries' must be conducted with respect to specific property, and the particular estimates of economic impact and ultimate valuation relevant in the unique circumstances." *Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264, 295 (1981). After it is determined that the commission properly established its jurisdiction "[t]he 'taking' issue remains available to, and may be litigated by, any owner or lessee whose property interest is adversely affected by the enforcement of the Act." *Id.* at 306 (Powell, J., concurring).

The refusal by the Court of Appeal to address the specific burdens imposed on the Nollans by the commission's order denied the Nollans their constitutional right to "a determination that the public at large, rather than a single owner, must bear the burden of an exercise of state power in the public interest [to expand the area of public use at Faria Beach]." *Agins*, 447 U.S. at 260.

———o———

CONCLUSION

This case is controlled by two lines of decisions of this Court. It has uniformly been held that physical invasions of private property authorized by government violate the Taking Clause and that special costs cannot be imposed on property owners in the absence of any special benefit received or burdens created by the property

owners' actions. The decision of the Court of Appeal should be reversed and the judgment of the trial court affirmed.

December, 1986.

Of Counsel

TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, CA 95814
Telephone: (916) 444-0154

Attorneys for Appellants

APPENDIX

PERTINENT CALIFORNIA STATUTES

1. **California Civil Code:**

§ 654. Ownership; property defined

PROPERTY WHAT. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.

2. **California Public Resources Code:**

§ 30106. Development

"Development" means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal or any dredged material or of any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of use of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvesting of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations which are in accordance with a timber harvesting plan submitted pursuant to the provisions of the Z'berg-Nejedly Forest Practice Act of 1973 (commencing with Section 4511).

As used in this section, "structure" includes, but is not limited to, any building, road, pipe, flume,

conduit, siphon, aqueduct, telephone line, and electrical power transmission and distribution line.

§ 30212. New development projects

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected. Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not seaward of the location of the former structure.

(5) Any repair or maintenance activity for which the commission has determined, pursuant to

Section 30610, that a coastal development permit will be required unless the commission determines that the activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision, "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

§ 30600. Coastal development permit; local government

(a) In addition to obtaining any other permit required by law from any local government or from any state, regional, or local agency, on or after January 1, 1977, any person wishing to perform or undertake any development in the coastal zone, other than a facility subject to the provisions of Section 25500, shall obtain a coastal development permit.

[Balance of Section Omitted]

APPELLEE'S

BRIEF

Supreme Court, U.S.
FILED
FEB 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN AND
MARILYN HARVEY NOLLAN,

Appellants,

VS.

CALIFORNIA COASTAL COMMISSION,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR APPELLEE

JOHN K. VAN DE KAMP,
Attorney General
of the State of California
ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General
N. GREGORY TAYLOR
Assistant Attorney General
ANTHONY M. SUMMERS
Supervising Deputy Attorney General
*JAMEE JORDAN PATTERSON
*Counsel of Record
Deputy Attorney General
110 West A Street, Suite 700
San Diego, California 92101
Telephone: (619) 237-6050

Attorneys for Appellee
California Coastal Commission

PANDICK PRESS, 1900 S. FIGUEROA STREET, LOS ANGELES, CALIFORNIA (213) 747-4321

BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Pursuant to the police power, may government, as a condition to approval of a new development project, require a property owner to allow the public to pass across the narrow, sandy beach portion of the property in order to compensate for the burdens on the public's right of access to the publicly owned tidelands which will emanate from the cumulative impacts of that and similar projects?

2. Where such a condition is imposed on a permit sought by a lessee of a residential lot, must compensation be paid when the lessee, knowing of the condition, subsequently purchases the lot and replaces an existing small house with a new, substantially larger one?

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED ..... (i)
STATEMENT OF THE CASE 1-10
SUMMARY OF ARGUMENT 10-11
ARGUMENT 12-36
I THIS COURT LACKS JURISDICTION TO HEAR THIS CASE 12-14
A. Appellants Failed to Properly Raise the Question of Compensation for the Valid Exercise of the Police Power in the State Courts Below; Consequently, It Cannot Be Raised in this Court for the First Time 12
B. Appellants Have Waived Their Rights to Challenge the Access Condition Under State Law by Constructing the Development Prior to Final Adjudication of This Matter 13-14
II THE TEST FOR THE VALIDITY OF THE ACCESS CONDITION IS WHETHER THE CONDITION IS RATIONALLY RELATED TO A LEGITIMATE PUBLIC PURPOSE, AND WHETHER THE CONDITION IS REASONABLY RELATED TO A PUBLIC BURDEN OR NEED CREATED, OR CONTRIBUTED TO, BY THE PROPOSED DEVELOPMENT 14-16
III THE COMMISSION'S DECISION IMPOSING THE ACCESS CONDITION CONSTITUTES A VALID EXERCISE OF THE POLICE POWER 16-26
A. Regulation of Land Use Pursuant to the Police Power Is Valid 16
B. The Regulation of Land Use Pursuant to the Police Power Includes the Ability to Condition Approval of Development 17-22
1. Conditions May Properly Take Into Consideration the Cumulative Impacts of Proposed Developments 17-18
2. Conditions on Development Approvals May Include Requirements of Dedication 18-22
C. The Land Use Regulation in Question Serves the Important Public Purpose of Allowing Public Access to Publicly Owned Tidelands 22-24

PAGE

D. The California Legislature Has Determined That Public Access Conditions Are Appropriate in New Development Projects 24-26
IV IMPOSITION OF THE ACCESS CONDITION DOES NOT RESULT IN A TAKING OF APPELLANTS' PROPERTY 26-35
A. The Nollans' Property Interest Is Subject to the State Constitutional Provision Protecting Public Access to the Tidelands 26-27
B. Contrary to Appellants' Assertions, This Is Not a So-Called Physical Invasion Case 27-30
C. Analysis of the Factors Which This Court Has Previously Identified as Significant to Finding a Taking Discloses There Has Been No Taking of Appellants' Property 31-35
1. The Nature of the Governmental Action in Question Is the Protection of Constitutionally Guaranteed Public Rights 31-32
2. The Nollans Have Not Been Deprived of All Economic Use or Value of Their Property 33-34
3. The Access Condition Does Not Interfere With Any Reasonable Investment-Backed Expectation of the Appellants 34-35
V THE NOLLANS ARE NOT ENTITLED TO COMPENSATION 36
CONCLUSION 37
APPENDIX A-1-A-4

TABLE OF CITATIONS

CASES	PAGE
Agins v. *Tiburon* (1980) 447 U.S. 255	15, 17, 36
Andrus v. *Allard* (1979) 444 U.S. 51	27, 34
Arnel Development Co. v. *City of Costa Mesa* (1981) 126 Cal.App.3d 330 [178 Cal.Rptr. 723]	21
Associated Home Builders etc., Inc. v. *City of Walnut Creek* (1971) 4 Cal.3d 633 [94 Cal.Rptr. 630, 484 P.2d 606] dismissed for want of a substantial federal question 404 U.S. 878	19, 22
Atchison R. Co. v. *Pub. Util. Comm'n* (1953) 346 U.S. 346	14
Ayres v. *City Council of Los Angeles* (1949) 34 Cal.2d 31 [207 P.2d 1]	19
Baltimore Gas & Electric Co. v. *NRDC* (1983) 462 U.S. 87	18
Board of Regents v. *Roth* (1972) 408 U.S. 564	26
CEEED v. *California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306 [118 Cal.Rptr. 315]	23
Cooper v. *California* (1967) 386 U.S. 58	31
County of Los Angeles v. *Berk* (1980) 26 Cal.3d 201 [161 Cal.Rptr. 742, 605 P.2d 381]	24
Day-Brite Lighting, Inc. v. *Missouri* (1952) 342 U.S. 421	25
Euclid v. *Ambler Co.* (1926) 272 U.S. 365	14, 16, 34
Frisco Land & Mining Co. v. *State of California* (1977) 74 Cal.App.3d 736 [141 Cal.Rptr. 820] cert. denied 436 U.S. 918	20
Georgia-Pacific Corp. v. *California Coastal Com.* (1982) 132 Cal.App.3d 678 [183 Cal.Rptr. 395]	20, 22
Gion v. *City of Santa Cruz* (1970) 2 Cal.3d 29 [84 Cal.Rptr. 162, 465 P.2d 50]	24
Goldblatt v. *Hempstead* (1962) 369 U.S. 590	15
Gorieb v. *Fox* (1927) 274 U.S. 603	16, 17
Grupe v. *California Coastal Com.* (1985) 166 Cal.App.3d 148 [212 Cal.Rptr. 578]	9, 10, 12, 20, 22, 30, 34, 35
Hadacheck v. *Sebastian* (1915) 239 U.S. 394	14, 34
Henry Dalton & Sons Co. v. *Oakland* (1914) 168 Cal. 463	27
Kaiser Aetna v. *United States* (1979) 444 U.S. 164	15, 29, 30, 31

CASES	PAGE
Kelber v. *City of Upland* (1957) 155 Cal.App.2d 631 [318 P.2d 561]	21
Lane v. *City of Redondo Beach* (1975) 49 Cal.App.3d 251 [122 Cal.Rptr. 189]	27
Liberty v. *California Coastal Com.* (1980) 113 Cal.App.3d 491 [170 Cal.Rptr. 247]	20, 21
Loretto v. *Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419	28
Marks v. *Whitney* (1971) 6 Cal.3d 251 [98 Cal.Rptr. 790, 491 P.2d 374]	24, 35
Martino v. *Santa Clara Valley Water Dist.* (9th Cir. 1983) 703 F.2d 1141	33
Minnesota v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 456	25
National Wildlife Federation v. *F.E.R.C.* (9th Cir. 1986) 801 F.2d 1505	18
Natural Resources Defense Council, Inc. v. *California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 76 [129 Cal. Rptr. 57]	20
Natural Resources Defense Council v. *Callaway* (2d Cir. 1975) 524 F.2d 79	18
Nectow v. *Cambridge* (1928) 277 U.S. 183	14
Pacific Legal Foundation v. *California Coastal Com.* (1982) 33 Cal.3d 158 [188 Cal.Rptr. 104, 655 P.2d 306]	2, 23, 25, 26
Penn Central Transp. Co. v. *New York City* (1978) 438 U.S. 104	15, 16, 17, 18, 29, 31, 34
People ex rel. *Younger* v. *County of El Dorado* (1979) 96 Cal.App.3d 403 [157 Cal.Rptr. 815]	27
Pruneyard Shopping Center v. *Robins* (1980) 447 U.S. 74	15, 16, 18, 30, 31, 32
Remmenga v. *California Coastal Com.* (1985) 163 Cal.App.3d 623 [209 Cal.Rptr. 628] dismissed for want of a federal question ____ U.S. ____ [88 L.Ed.2d 250, 106 S.Ct. 241]	19, 22, 25
Ruckelshaus v. *Monsanto Co.* (1984) 467 U.S. 986	26, 31, 34
San Diego Gas & Electric Co. v. *San Diego* (1981) 450 U.S. 621	36
Scrutton v. *County of Sacramento* (1969) 275 Cal.App.2d 412 [79 Cal.Rptr. 872]	21

CASES **PAGE**

Sea Ranch Ass'n v. *California Coastal Com'n* (1981) 527 F.Supp. 390, judgment vacated on grounds of mootness because of settlement of the controversy in question, 454 U.S. 1070 ..... 20, 21

Selby Realty Co. v. *O'Bannon* (1969) 2 Cal.App.3d 917 [82 Cal.Rptr. 807] 13

Sierra Club v. *Marsh* (1st Cir. 1985) 769 F.2d 868 18

Simon v. *Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26 14

Swarzwald v. *Cooley* (1940) 39 Cal.App.2d 306 35

United States v. *Causby* (1945) 328 U.S. 262 28

United States v. *Riverside Bayview Homes* (1985) 474 U.S. ____ [88 L.Ed.2d 419, 106 S.Ct. 455] 16

Vance v. *Bradley* (1979) 440 U.S. 93 25

Webb's Fabulous Pharmacies, Inc. v. *Beckwith* (1980) 449 U.S. 155 26

Welch v. *Swasey* (1909) 214 U.S. 91 ..... 16, 17

Whaler's Village Club v. *California Coastal Com.* (1985) 173 Cal.App.3d 240 [220 Cal.Rptr. 2], dismissed for want of jurisdiction ____ U.S. ____ [90 L.Ed.2d 648, 106 S.Ct. 1962] 19, 34, 35

Wickard v. *Filburn* (1942) 317 U.S. 111 ..... 17, 22

Williamson Planning Comm'n v. *Hamilton Bank* (1985) 473 ____ U.S. ____ [87 L.Ed.2d 126, 105 S.Ct. 3108] 33, 36

CODES **PAGE**

Cal. Pub. Resources Code, §§ 27000 22
27001 2
30000 ..... 1, 22
30001 24
30001.5, subd. (c) 2, 25
30103 3
30105.5 18
30106 3
30210 ..... 2, 9, 27
30211 9
30212 ..... 3, 9
30212, subd. (a) 25
30250 18
30600 3
30607 3
16 U.S.C. §§ 800 18
1451 18
1451-1464 3
1452(2)(D) 26
1454 9
1454, subd. (b)(7) 3
1454-1455 3
42 U.S.C. § 4321 et seq. 18
Code Civ. Proc., §§ 916 ..... 9, 13
1110 ..... 9, 13
Cal. Civ. Code, § 846 35
33 C.F.R. 320.4(e) 18
320.4(g)(2) 18
325.4(a) 18
86 Stats. 1281, §§ 301-315 3

CONSTITUTIONS **PAGE**

Cal. Const., art. X, § 4 .....2, 3, 9, 11, 24, 27, 34, 35

Fifth Amendment,
U.S. Const. 12, 16, 26

ACTS

Coastal Zone Management Act (federal).....3, 9, 18
California Coastal Act of 1976
.....1, 2, 3, 9, 11, 20, 22, 23, 24, 27, 32, 34

California Coastal Zone Conservation Act of 1972 22

Federal Power Act..... 18

National Environmental Policy Act of 1976..... 18

MISCELLANEOUS

Maloney and Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping* (1974) 53 No. Carolina L.Rev. pp. 185, 224-233..... 35

No. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN AND
MARILYN HARVEY NOLLAN,

Appellants,

VS.

CALIFORNIA COASTAL COMMISSION,

Appellee.

ON APPEAL FROM THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

Appellee California Coastal Commission is a state agency charged with planning and regulation of land use along California's 1,000 mile coastline pursuant to the California Coastal Act of 1976. (Cal. Pub. Resources Code, §30000 et seq.) The Coastal Act of 1976 is the legislative continuation of the scheme for coastal protection originally adopted by the People of California as an initiative measure in 1972. In adopting the 1972 Coastal Initiative, the people declared that California's

coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem. The people further found that the permanent protection of the remaining natural and scenic resources of the coastal zone is a paramount concern for present and future residents of the state and nation. (Cal. Pub. Resources Code, §27001.) One of the primary goals of the Coastal Initiative was the preservation of public access to the publicly owned tidelands. Public access to the tidelands is protected by Article X, section 4 of the California Constitution. The Coastal Initiative was designed to implement that constitutional protection.

As required by the initiative, the California Coastal Plan was prepared for the future regulation and development of the coastal zone. The plan identified public coastal access as a major long-term goal of coastal conservation and development. The Coastal Plan was submitted to the Legislature which used it as a guide to enact the Coastal Act of 1976. ("Coastal Act"; *Pacific Legal Foundation* v. *California Coastal Com.* (1982) 33 Cal.3d 158, 164 [188 Cal.Rptr. 104, 655 P.2d 306].) In the 1976 Act, the Legislature found and declared that one of the basic goals of the state for the coastal zone is to maximize public access to and along the coast consistent with sound resource conservation principles and constitutionally protected rights of private property owners. (Cal. Pub. Resources Code, §30001.5, subd. (c).) The Legislature consequently adopted the policy that, in carrying out the requirement of Article X, section 4 of the California Constitution, maximum access shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners and natural resource areas from overuse. (Cal. Pub. Resources Code, §30210.)

Under the California Coastal Act of 1976, the Legislature authorized the California Coastal Commission ("Commission") to approve coastal development permits for new development projects in the geographically limited coastal zone and to attach conditions to permits to offset the deleterious impacts

new development projects will impose on coastal resources. (Cal. Pub. Resources Code, §§30103, 30106, 30600 and 30607.) The Coastal Act mandates the Commission to condition its approval of new beachfront development projects upon protection and provision of public access to and along the coast, consistent with the state constitutional provision ensuring public access to those public lands. (Cal. Const., art. X §4; Cal. Pub. Resources Code, §30212.) The Coastal Act became one of the components of California's coastal zone management program that was adopted pursuant to the Federal Coastal Zone Management Act ("CZMA"). (86 Stats. 1281, §§301-316; 16 U.S.C.§§1451-1464.) The CZMA encourages states to develop and implement coastal management programs, which, after review and approval by the Secretary of Commerce, guide land and water uses in the state's coastal zone. (16 U.S.C. §§1454-1455.) The CZMA requires such management plans to include a planning process for the protection of, and public access to, beaches and other coastal resources. (16 U.S.C. §1454, subd. (b)(7).) The Secretary of Commerce approved California's Coastal Zone Management Plan in 1977, including the provisions on public access. It is the Commission's ability to implement those access provisions and protect public access to the tidelands which is challenged here.

James Patrick Nollan and Marilyn Harvey Nollan ("Nollans") appeal from the decision of the California Court of Appeal. The court below upheld the Commission's ability to condition the Nollans' new development project so as to protect public access to the tidelands from the project's adverse impacts, both individual and cumulative.

The Nollans' property which is the subject of this litigation is located in the Faria Beach Tract of Ventura County, California. The Faria Beach area, including the Nollans' beach property, is a popular recreation area. (Joint Appendix ("JA") 81-82, 255-260.) Faria County Park is located nearly a third of a mile upcoast from the Nollan property and the Cove Beach (a private cove where public use is permitted) is located 1,800

feet downcoast. (JA 49.) However, no continuous access linkage along the coast exists between the Cove and Faria County Park. The public was given permission by the Nollans' predecessors-in-interest to use the beach along the Faria Tract for lateral access. (JA 48.) The Nollans have continued to permit public use. (JA 303.) The public has also made use of the beach at Faria for recreational purposes, including surfing, beach hiking and bathing. (JA 69.) Due to the long continued public use, public prescriptive rights may have arisen in the Faria Beach area, including the Nollan property. (JA 85-86.) While the public has made substantial use of the Faria Beach area in the past, including the beach area of the Nollan property, no assurance exists that such use will be allowed to continue. (JA 303.)

The Faria Beach Tract was originally comprised of small beach cottages, such as the Nollans', which were used mainly as vacation homes. (JA 40.) As in many other coastal communities, these small secondary homes are being torn down and replaced with much bigger primary residences. (JA 60.) The Commission has approved many permits for such demolition and new construction in the Faria Tract, including one on each side of the Nollan property. (JA 58.)

In 1982 appellants leased their lot in the Faria Beach Tract. (Juris. State., p. 5.) On March 1, 1982, the Nollans applied to appellee Commission for a coastal development permit to demolish their one story, 521 square foot, one bedroom, substandard beach house and construct a two story, three bedroom, 1,674 square foot residence with attached two-car garage. (JA 47.) While the beach house had been used in the past as a summer home and vacation rental, it had not been used at all since March 1982. (Juris. State., p. 5.) The Nollans intend to live permanently in the new residence, in contrast to the limited occasional vacation use by them and renters of the smaller structure. (Juris. State., p. 5, JA 59.) The Nollans' new residence is three times larger and one story higher than the old beach house and greatly increases the gross floor area to 2,464

square feet. (JA 56.) The Nollans' lot is 2,800 square feet.[1] (JA 23a, 56.) The new house will cover nearly all the buildable lot space behind the seawall, extending to within three feet of the lot lines on either side. (JA 26.) All development proposed by the Nollans is landward of the seawall. The seawall is located very near the mean high tide line. (JA 61.) The public owns the tidelands below the mean high water line. At times the seawall appears to be about 10 feet from the high water line. (*Ibid.*) At other times the water extends up to the Nollans' seawall, as well as the seawalls of neighboring residents, preventing pedestrian passage along the shore when the tide is in. (*Id.* at p. 68; see also photographs found at JA 262-276 depicting the water and the beach conditions at Faria.)

The Commission placed the Nollans' application on what is known as the administrative permit calendar, which allows only an abbreviated public hearing. Over the Nollans' objection, the application was approved on April 7, 1982, with a condition requiring that the Nollans provide lateral public access. The Nollans then filed a petition for a writ of mandate. On January 17, 1983, after a hearing, the trial court ordered that a " 'writ of mandate shall issue from this court, remanding the proceedings to respondent and commanding respondent to set aside its decision of April 7, 1982 . . . and set the matter for a full evidentiary hearing.' " (JA 40.)

---

[1]The Nollans have criticized the figures used by the Commission to describe their project, stating they are incorrect and their lot is 3,800 square feet. (JA 397, Juris. State. p. 4; Response to Motion to Dismiss, p. 2.) However, the figures used by the Commission were supplied by the Nollans' architect, who designed the project and who was authorized by the Nollans to act as their representative and bind them in all matters concerning the permit. (JA 12, 23a.) While Mr. Nollan at one point indicated those figures were incorrect, the Nollans never supplied any substitute figures to correct the alleged inaccuracies before the Commission. (JA 397.) Neither figure is absolute, in any event, since the Nollans' seaward boundary line is the mean high tide line which is ambulatory and fluctuates, hence the size of the lot will fluctuate. (JA 61, 125, 204; compare photographs of Faria Beach at JA 262-264 and 272-274.)

Upon remand a full public hearing was held before the Commission. The Commission sought the advice of the State Lands Commission because questions had been raised regarding public rights in the Nollan property. A Senior Land Agent from the Department of Justice interviewed 30 people about public use of the area, their own use and that of many others. (Ja 85-86)[2] In his opinion, the area seaward of the Nollans' seawall had been impliedly dedicated through public use. (*Ibid.*) He also investigated the sovereign nature of the property seaward of the seawall and concluded that it was possible that the land was below the mean high tide line and hence sovereign land. (*Ibid.*) At the public hearing, which was held on two separate dates, the Commission received the staff report together with the State Lands Commission study undertaken by the Senior Land Agent, public testimony and input from the Nollans. The Commission also heard testimony from a representative of South Central Coast Watch who supported the access condition because of anticipated impacts on public access due to the project and the landward migration of the ocean due to erosion. (JA 308-309.) A representative of the Western Surfing Association testified that loss of access would adversely affect persons who have used and presently use the area. (JA 289-290.) In addition the Commission considered the following evidence: reports on 12 permits for demolition and new construction of single family residences in the Faria Beach Tract as well as four other permits, a Ventura Beaches Study which included Faria Beach, a Commission study on coastal public access in San Diego, a study of the cumulative impacts of shore zone development at Lake Tahoe, a handbook for planners on coastal regulation, three scholarly articles on coastal access problems encountered in other states and a beach user study as well as slides of the Nollans' property and the Faria area. (JA 42-43, listing these documents.) Most of these documents are included in the Joint Appendix. (JA 81-276.)

[2]Declarations of 18 people interviewed were attached to his report and are found in the administrative record at pages 79-121. (JA 86.)

The Commission found that the Nollans' project would adversely impact public access rights. (JA 62, 65-66.) The evidence before the Commission demonstrated both the individual and cumulative impacts of the new development. The reports on permits in the immediate vicinity, a study of beaches in the area, testimony from the public, surfing articles about Faria, and the information derived from the implied dedication and sovereign interest investigation constitute concrete evidence of the past history and present conditions in the Faria area including the Nollan property. (See JA 81-86, 255-276, and pp. 79-121, 186-279 of the second volume of the administrative record.) This evidence clearly shows the trend of development in Faria. The scholarly works and studies about other coastal areas demonstrate the likely and probable future impacts of proposed development and allowed the Commission to extrapolate and analogize. (JA 87-254.) The use of evidence such as this is the essence of land use planning: it gives the Commission the ability to predict probable outcomes by learning from the past and similar situations.

The Nollans' project is one of many in Faria Beach area. As of 1983 when the Commission heard their application, the Commission had heard 60 requests for permits in the Faria Beach Tract. Approximately 43 were approved with access conditions, 14 were processed prior to adoption of the current regulations which allow joint lessor/lessee applications, and the other 3 were for non-beachfront lots. (JA 48.) The remaining 78 lots in the tract will likely undergo similar development. (JA 60-61.) The Commission found increases in development and high structure densities have impacts on existing access. As private development increases, public use of adjacent tidelands decreases. (JA 62-64, 174-183.) A study of Ventura County Beaches, including the Faria area, by the State Department of Parks and Recreation in 1976 demonstrates the need for public access resulting from increased buildout. The study identified erosion, over-crowding of existing facilities and loss of open space as factors limiting public access to the beach. (JA 255-260.) The Commission found increased development in the area will exacerbate these problems. (JA 57-61.)

As the studies in the record demonstrate, if the public cannot see the coast, the public is not inclined to use it. (JA 62-66, 161-200, 221-254.) As a result other areas will be sought by the public for beach use. (JA 96.) Those areas will become increasingly crowded as development in places like Faria grows. (JA 59.) Given the already limited availability of accessible beach areas, the impacts on public access to and use of the tidelands are undeniable. (See JA 123-124, 161-163, 201-202, 247-250.) The Nollans' house contributes to these problems. It is a visual impediment to public access. Being three times larger than the cottage it replaced and covering nearly the entire lot, the project will block any previously available view. Directly on either side are two new larger structures. Twelve permits for similar developments are in the record. The end result of all this new construction will be a wall of large two story homes instead of the previous small beach cottages. Any public view of the ocean from the road will be obliterated. The only remaining view will be from these private homes and will be solely reserved for their occupants. Absent a public right of access between the ocean and these buildings, the public will be precluded from visual as well as physical enjoyment of the sea. (JA 62.)

At the conclusion of the hearing, the Commission approved the Nollan permit subject to recordation of a deed restriction acknowledging the right of the public to pass and repass across the narrow beach between the ocean and the toe of the Nollans' seawall.[3] In requiring the deed restriction, the

[3]Such a condition for pass and repass lateral access merely permits the public to walk and run along the shoreline parallel to the water. No additional use is allowed, including loitering, sunbathing and the like. (See JA 379.) The access condition imposed is the least intrusive type of condition. Under certain other circumstances the Commission may require an applicant to permit passive recreational use. (JA 370-371.) The deed restriction is used where it is necessary to protect habitat values of a site, where topographic constraints warrant the restriction, or where the privacy of the owner must be protected. (JA 370.) The access condition does not apply to any of the Nollans' property landward of the seawall (where their new house is located) and no public use of that area is permitted.

Commission was acting in accord with Article X, section 4 of the California Constitution, section 1454 of the Federal Coastal Zone Management Act (16 U.S.C. §1454), and sections 30210, 30211 and 30212 of the California Coastal Act. (Cal. Pub. Resources Code, §§30210-30212; all relevant provisions of the Coastal Act are included in the attached Appendix.)

After the Commission rendered its decision, the Nollans filed a Supplemental Petition for Writ of Mandate on July 15, 1983. (JA 328-398.) On December 5, 1983, the matter was tried by the court. The trial court granted the Petition for Writ of Mandate, invalidating the access condition and remanding the matter to the Commission. (JA 412-420.) Following the trial court decision, the Nollans purchased the beachfront lot from the Faria Family Trust, demolished the cottage and built the new house. (Juris. State., p. 5, fn. 1.) They neither sought to have the coastal permit issued nor complied with its conditions. The permit remains in the Commission's file in its Santa Barbara office.[4]

Rather than accepting the remand and striking the condition, the Commission filed a timely appeal, and the Court of Appeal reversed the judgment granting the writ of mandate in an opinion published on January 24, 1986. (JA 421-427.) The Court of Appeal found that the Nollans' project, together with others like it, limits public access to the tidelands and beaches. Collectively these projects create a need for public access. (JA 425.) In upholding the access condition, the appellate court relied extensively on *Grupe* v. *California Coastal Com.* (1985) 166 Cal.App.3d 148 [212 Cal.Rptr. 578], essentially incorporating the reasoning of that opinion by reference. As the Court of Appeal noted, the facts in *Grupe* were substantially similar to the facts in the Nollans' case. (JA 425.) The only difference was that Grupe sought to build a residence on one of

[4]California law permits an appeal within 60 days of the trial court judgment. Once the appeal is filed, the trial court judgment remains stayed pending the outcome of the appeal. (Code Civ. Proc., §§916, 1110.)

the few remaining vacant lots in his subdivision. (JA 425.) Since both projects constituted new development, the difference was not relevant. (JA 425.) All of the arguments raised by the Nollans were raised and thoroughly analyzed in the *Grupe* decision upholding the access condition in question there.

The Nollans' request for review by the California Supreme Court was denied. (Juris. State., App. B, p. 10.)

SUMMARY OF ARGUMENT

1. The Court lacks jurisdiction to hear this case. The federal question of compensation presented was never raised or decided by the court below. Additionally, under state law, the Nollans have waived their right to challenge the access condition at issue by building the house prior to final adjudication of their rights.

2. The following test should be utilized to assess the validity of a condition on development approval: the condition must be rationally related to a legitimate public purpose; the condition must satisfy or alleviate public needs or burdens created or contributed to by the development; the condition may not deprive the landowner of all reasonable or economic use of the property nor may it impermissibly interfere with reasonable investment-backed expectations; the burden on the landowner may not be disproportionate, considering both the public needs or burdens and any benefits to the landowner.

This test is comprised of elements previously used by this Court and others in ruling on the takings question. It represents a fair balancing of the interests of the public with the interests of landowners.

3. Police power land use regulation includes the government's ability to place conditions on approval of development. Conditions may be based on the cumulative as well as the individual impacts of projects. Conditions requiring public use

of portions of property are appropriate where the need for the condition is created or contributed to by a project. Conditions allowing public access pursuant to the California Coastal Act of 1976 serve the important public purpose of ensuring the public's ability to reach and use the publicly owned tidelands. They also protect public rights of access to tidelands, guaranteed by the state constitution, from the adverse impacts, both individual and cumulative, of new development along the coast.

4. The access condition in question does not effect a taking of the Nollans' property. The Nollans' property interest is limited by the state consitutional provision guaranteeing public access to the tidelands. Article X, section 4 of the California Constitution precludes the Nollans from excluding the public from the tidelands where required for a public purpose. While the access condition does allow public use of the property, it does not amount to a physical invasion requiring a finding of a *per se* taking. The evidence demonstrates that the Nollans development will have adverse impacts on the public's ability to use the tidelands. The Nollans will also benefit from the condition since they will be able to utilize similar access made available by conditions imposed on other new development projects, in Faria and elsewhere along the California coast. The condition does not deprive the Nollans of all reasonable or economic use of their lot. They have built their new house on the only buildable portion of their lot. They are not precluded from using the beach so long as they do not interfere with the public passing along the shore. Their property is presumably worth more with the new house than with the old one. The Nollans purchased their lot and built the new house after the Commission's decision requiring access, hence their reasonable investment-backed expectations have not been affected.

5. Compensation is neither appropriate nor required in this case since the Nollans have built their house without having fulfilled the condition and have suffered no damage. If the access condition is improper, the case should be remanded for its deletion.

ARGUMENT

I

THIS COURT LACKS JURISDICTION TO HEAR THIS CASE.

A. Appellants Failed to Properly Raise the Question of Compensation for the Valid Exercise of the Police Power in the State Courts Below; Consequently, It Cannot Be Raised in This Court for the First Time.

Appellee filed separately a Motion to Dismiss on the grounds that jurisdiction is lacking due to the Nollans' failure to properly present the federal question to the courts below. (Motion of Appellee California Coastal Commission to Dismiss filed November 26, 1986.) The motion was denied by the Court before the joint appendix was received. Appellee desires to preserve its objection, should this Court reconsider. Briefly stated, the sole relief sought in the state courts by the Nollans was invalidation of the access condition. (JA 328-347.) Nowhere did they seek compensation for the access condition in the event it was found to be valid. *(Ibid.)*

Appellants failed to properly raise in the state courts below the federal question of whether compensation under the Fifth Amendment to the United States Constitution is due for valid regulatory actions allowing public use of private property. Raising the question for the first time before this Court cannot confer jurisdiction. Therefore, the issue is not properly before the Court and jurisdiction will not lie.[5] (See Motion to Dismiss.)

[5]Insofar as the Nollans claim that they were entitled to and did not receive a thorough analysis of their "taking" claim, the Commission submits this is not a sufficient ground to confer jurisdiction. The Court of Appeal did address their claims, in part by reference to another Court of Appeal decision, *Grupe* v. *California Coastal Com., supra,* 166 Cal.App.3d 148. The *Nollan* court was in complete agreement with the extensive "taking" analysis contained in the *Grupe* decision and incorporated that analysis by reference rather then repeat it verbatim. Where, as here, the facts of a case are so nearly identical to a prior one that the only differences are irrelevant, reliance on the prior decision's reasoning is entirely appropriate.

B. Appellants Have Waived Their Rights to Challenge the Access Condition Under State Law by Constructing the Development Prior to Final Adjudication of This Matter.

As a separate ground for dismissal, appellee has raised the Nollans' waiver of the right to challenge the access condition due to their construction of the house. (Motion of Appellee California Coastal Commission to Dismiss.) Again to briefly state that position, following the trial court decision granting the petition for writ of mandate, the Nollans demolished the beach cottage and constructed their new house, ostensibly in reliance on that trial court decision. (Juris. State., p. 5, fn. 1.) However, the trial court decision was never effective. During the 60 days in which the Commission had to file an appeal, any reliance on the trial decision was at the Nollans' own risk. *(Selby Realty Co.* v. *O'Bannon* (1969) 2 Cal.App.3d 917, 923 [82 Cal.Rptr. 807].) Once the appeal was filed, the decision remained stayed pending final resolution of the appeal. (Code Civ. Proc. §§916, 1110.) The Commission never gave any approval to the Nollans to proceed with construction. The Commission declined to accept their tender of a deed restriction to be held in escrow because the terms of the restriction were inconsistent with the Commission's decision and the language used cast serious doubt on the validity of the proffered restriction. (JA 296-297, 384-390, 390-393.)[6]

[6]At the public hearing, the Nollans submitted their proposal for a deed restriction to be held in escrow pending the outcome of any subsequent litigation. (JA 384-390.) However, the deed restriction proposed did not conform to the terms of the condition being considered by the Commission. It was inherently contradictory and self-serving, stating the Commission's proposed condition was illegal and unconstitutional, casting serious question on the validity of the Nollans' proposal. It also incorrectly enumerated proscribed public uses which in any event were not contemplated by the Commission. *(Ibid.)* The Commission refused to accept the Nollans' proposed deed restriction, for these reasons and also on grounds that such a precedent might encourage litigation. (JA 296-297, 390-393.)

For the reasons set forth in appellee's Motion to Dismiss, the Nollans have waived their right to challenge the public access condition. Hence, no case or controversy remains for this Court to decide and jurisdiction will not lie. (*Simon* v. *Eastern Ky. Welfare Rights Org.* (1976) 426 U.S. 26, 37.) The case should be dismissed.

II

THE TEST FOR THE VALIDITY OF THE ACCESS CONDITION IS WHETHER THE CONDITION IS RATIONALLY RELATED TO A LEGITIMATE PUBLIC PURPOSE, AND WHETHER THE CONDITION IS REASONABLY RELATED TO A PUBLIC BURDEN OR NEED CREATED, OR CONTRIBUTED TO, BY THE PROPOSED DEVELOPMENT.

The Commission submits the following test should be utilized to assess the validity of a condition attached to development approval:

1. First, the condition must be a valid exercise of the police power.

a. The development must affect the public. It must either create, alone or together with other similar projects, a public need or place a burden on a public right. (*Hadacheck* v. *Sebastian* (1915) 239 U.S. 394, 411; *Atchison, R. Co.* v. *Pub. Util. Comm'n* (1953) 346 U.S. 346, 353, 354.)

b. The condition must be rationally related to a legitimate public purpose. It must satisfy the public need or alleviate the public burden which the development creates or contributes to. (*Euclid* v. *Ambler Co.* (1926) 272 U.S. 365; *Nectow* v. *Cambridge* (1928) 277 U.S. 183, 188.)

2. Second, the condition may not violate the traditional takings tests employed by this Court.

a. An owner may not be deprived of all economic use or value of the property under the guise of a

condition of approval. (*Penn Central Transp. Co.* v. *New York City* (1978) 438 U.S. 104.)

b. The burden on the private landowner may not be clearly disproportionate, taking into account both the public burden or need and any benefit to the landowner, including any increase in value which the landowner receives by virtue of the government approval. (*Agins* v. *Tiburon* (1980) 477 U.S. 255, 262; *Goldblatt* v. *Hempstead* (1962) 369 U.S. 590, 594-596.)

c. The condition may not impermissibly interfere with reasonable investment-backed expectations. (*Kaiser Aetna* v. *United States* (1979) 444 U.S. 164, 179; *Pruneyard Shopping Center* v. *Robins* (1980) 447 U.S. 74, 84.)

The Commission submits that the access condition in question easily satisfies this test, as well as that proposed by the United States in its amicus brief. (Brief for the United States, p. 9.) Nevertheless, the delineation of the test is important. The United States fails to incorporate in its test any notion of cumulative or incremental impacts of individual small developments. (*Id.* at p. 22.) It also fails to recognize that one factor which must enter into the consideration of how a property owner is impacted by a condition is the increase in property value which may accompany the granting of a permit. (*Id.* at p. 28.)

The Commission asks this Court to adopt this test so that courts and land planners will have an appropriate standard to utilize in rendering their decisions. It is all very well to say that a governmental entity must know the Constitutional limits of its authority, but without a clearly articulated statement to define those limits, this Court will continue to see myriad requests for review. The standard proposed here will enable both land use

regulators and courts to articulate their reasoning in light of the Constitutional standards. Perhaps most important of all, both regulators and those regulated will obtain the benefit of predictability in the conduct of their affairs.

The Fifth Amendment certainly provides the ultimate statement of the limits of governmental authority, but it does not provide the practical guidance needed for assessing the validity of conditions of land use permits in today's complex society.

III

THE COMMISSION'S DECISION IMPOSING THE ACCESS CONDITION CONSTITUTES A VALID EXERCISE OF THE POLICE POWER.

A. Regulation of Land Use Pursuant to the Police Power is Valid.

The regulation of land use is a long, venerable tradition which this Court has recognized as a proper exercise of the police power. (*Welch* v. *Swasey* (1909) 214 U.S. 91; *Euclid* v. *Ambler Co., supra*, 272 U.S. 365; *Gorieb* v. *Fox* (1927) 274 U.S. 603; *Penn Central Transp. Co.* v. *New York City, supra*, 438 U.S. 104.) This Court has upheld land use regulation in the context of zoning (*Euclid* v. *Ambler Co., supra*), historic landmark preservation (*Penn Central Transp. Co.* v. *New York City, supra*), wetland preservation (*United States* v. *Riverside Bayview Homes* (1985) 474 U.S. ____ [88 L.Ed.2d 419, 106 S.Ct. 455] and even the protection of freedom of speech (*Pruneyard Shopping Center* v. *Robins, supra*, 447 U.S. 74). Appellants do not dispute this ability of government to regulate land use pursuant to the police power. (Appellants' Brief on the Merits, pp. 24-25, 35.)

B. The Regulation of Land Use Pursuant to the Police Power Includes the Ability to Condition Approval of Development.

The police power encompasses the ability to condition the use of land so as to protect public interests. (*Agins* v. *Tiburon, supra*, 447 U.S. 255, upholding siting and design limitations aimed at preserving open space and the scenic quality of an area; *Penn Central Transp. Co.* v. *New York City, supra*, 438 U.S. 104, upholding historic landmark preservation law precluding construction of a multi-story building above Grand Central Terminal; *Welch* v. *Swasey, supra*, 214 U.S. 91, upholding height restrictions; and *Gorieb* v. *Fox, supra*, 274 U.S. 603, upholding requirement that certain portions of parcels be left unbuilt.) Pursuant to the police power, appellee Commission has the ability to condition approval of coastal development so as to protect public interests.

1. Conditions May Properly Take Into Consideration the Cumulative Impacts of Proposed Developments.

Appellants argue that conditions may only be attached to approval of development if the development *alone* would create the need for the condition. Such an argument ignores reality and established precedent. The impacts of a proposed project cannot be isolated or separated from the impacts of other projects in the area.

Regulation based on the impacts of the aggregate as opposed to impacts of an individual has long been accepted. As this Court explained in *Wickard* v. *Filburn* (1942) 317 U.S. 111, 127, in upholding regulation designed to control the price of wheat pursuant to the Commerce Clause:

> "That appellee's own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial. . . ."

Consideration of the cumulative impacts of proposed projects is integral to land use and environmental regulation. Congress has consistently obligated governmental agencies to consider the impacts of a project together with others like it. (Federal Power Act, 16 U.S.C. §800 et seq.; National Environmental Policy Act of 1976, 42 U.S.C. §4321 et seq.; Coastal Zone Management Act, 16 U.S.C. §1451 et seq.) The courts have reinforced this obligation, cautioning agencies that ignoring the cumulative impacts of a project would be in derogation of their duties. (*National Wildlife Federation* v. *F.E.R.C.* (9th Cir. 1986) 801 F.2d 1505, 1513; *Sierra Club* v. *Marsh* (1st Cir. 1985) 769 F.2d 868, 881.) As the Court in *Natural Resources Defense Council* v. *Callaway* (2d Cir. 1975) 524 F.2d 79, 88 aptly observed:

> ". . . an agency may not go to the opposite extreme of treating a project as an isolated 'single-shot' venture in the face of persuasive evidence that it is but one of several substantially similar operations, each of which will have the same polluting effect in the same area. To ignore the prospective cumulative harm under such circumstances could be to risk ecological disaster." (See also, *Baltimore Gas & Electric Co.* v. *NRDC* (1983) 462 U.S. 87, 106-107.)

The Commission is mandated to consider the cumulative impacts of new development projects. (Cal. Pub. Resources Code, §§30105.5, 30250.)

2. Conditions on Development Approvals May Include Requirements of Dedication.

Regulatory approvals are often conditioned upon requiring some public use of the applicant's property. (Federal Power Act, 16 U.S.C. §800 et seq.; 33 C.F.R. 320.4(e) and (g)(2), 325.4(a); *Penn Central Transp. Co.* v. *New York City*, *supra*, 438 U.S. 104; see also *Pruneyard Shopping Center* v. *Robins*, *supra*, 447 U.S. 74.) As noted in the Brief for the United States

(p.3), such conditions may even include dedications of public access. Moreover, dedications are not limited to the needs of or burdens created by a proposed project alone, but may be justified by cumulative impacts. (*Associated Home Builders etc., Inc.* v. *City of Walnut Creek*, (1971) 4 Cal.3d 633 [94 Cal.Rptr. 630, 484 P.2d 606], dismissed for want of a substantial federal question 404 U.S. 878; *Ayres* v. *City Council of Los Angeles* (1949) 34 Cal.2d 31 [207 P.2d 1]; *Remmenga* v. *California Coastal Com.* (1985) 163 Cal.App.3d 623 [209 Cal.Rptr. 628] dismissed for want of a federal question ____ U.S. ____ [88 L.Ed.2d 250, 106 S.Ct. 241]; *Whaler's Village Club* v. *California Coastal Com.* (1985) 173 Cal.App.3d 240 [220 Cal.Rptr. 2] dismissed for want of jurisdiction ____ U.S. ____ [90 L.Ed.2d 648, 106 S.Ct. 1962].)

The California courts have articulated the policy underlying this rule. In *Associated Home Builders etc., Inc.* v. *City of Walnut Creek*, *supra*, 4 Cal.3d 633, the California Supreme Court upheld a condition that required a subdivider to dedicate land or pay a fee for park or recreational purposes. As the court explained, the statute in question was justified on the basis of:

> ". . . a general public need for recreational facilities caused by present and future subdivisions. The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades. Manifestly governmental entities have the responsibility to provide park and recreation land to accommodate this human expansion despite the inexorable decrease of open space available to fulfill such need. . . ." (*Id.* at p. 638; *Ayres* v. *City Council of Los Angeles*, *supra*, 34 Cal.2d 31, upholding dedication conditions imposed on a subdivider based upon future as well as immediate needs.)

This reasoning has been applied to access conditions required pursuant to the Coastal Act. Utilizing this test, the courts in California have consistently recognized and upheld the Commission's authority to require dedication of public access as a condition of permit approval.[7] Perhaps the most cogent analysis was given by a three-judge panel of the federal district court in *Sea Ranch Ass'n* v. *California Coastal Com'n* (1981) 527 F.Supp. 390. (The judgment was subsequently vacated on grounds of mootness because of the settlement of the controversy in question but the analysis remains valid. See 454 U.S. 1070 and 552 F.Supp. 241.) After reviewing the Commission's authority under the Coastal Act, the court held:

> "With these provisions of the Act in mind, this court finds public access and aesthetic considerations constitute areas that legitimately fall within the Commission's regulatory power. The permitting process is the means for the Commission to enforce the power delegated to it. It is clear that the Commission would be in violation of the policies and its duties as spelled out under the Act if it had not formulated or imposed the challenged conditions. Absent imposition of these or similar conditions ten miles of the California coastline would become a private beach with many portions of it cut off from the public's view." (*Sea Ranch Ass'n.* v. *California Coastal Com., supra,* 527 F. Supp. at p. 393.)

---

[7]*Natural Resources Defense Council, Inc.* v. *California Coastal Zone Conservation Com.* (1976) 57 Cal.App.3d 76, 92 [129 Cal.Rptr. 57]; *Frisco Land & Mining Co.* v. *State of California* (1977) 74 Cal.App.3d 736, 754, [141 Cal.Rptr. 820] cert. denied 436 U.S. 918; *Liberty* v. *California Coastal Com.* (1980) 113 Cal.App.3d 491, 500 [170 Cal.Rptr. 247]; *Grupe* v. *California Coastal Com., supra,* 166 Cal.App.3d 148, 165. As stated in *Georgia-Pacific Corp.* v. *California Coastal Com.* (1982) 132 Cal.App.3d 678, 699 [183 Cal.Rptr. 395], "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this. . . ."

The court held:

> ". . . planning bodies may condition development on aesthetic considerations or dedications of property for public recreational facilities or access. *The fact that the development has no direct nexus to the condition, that the benefit to the public is greater than to the developer, or that future needs are taken into consideration, does not destroy the validity of the condition.* The court is free to look to these factors, as well as the general goals behind the authorizing statute, in evaluating the reasonableness of the regulation.
>
> "Applying these standards to the instant case it is clear that the challenged conditions must stand. The public need for access to state beaches on foot or visually and the importance the people of California place on that need have been embodied in the California Coastal Zone Conservation Act. The Act spelled out the need to maximize public access and views. As we noted earlier, failure to implement these conditions would result in loss of public access and views on a substantial portion of the northern California coastline. Moreover, the gradual build-out at Sea Ranch, and like developments in the region, with the likely attendant increase in local population and tourism, will increase the existing need for public access." (*Id.* at p. 395; emphasis added.)

California courts have recognized that conditions which do not bear a rational relationship to the burdens created or contributed to by a project are invalid. Such conditions have been invalidated as excessive exercises of the police power. (See, *Scrutton* v. *County of Sacramento* (1969) 275 Cal.App.2d 412, 421 [79 Cal.Rptr. 872]; *Kelber* v. *City of Upland* (1957) 155 Cal.App.2d 631, 638 [318 P.2d 561]; *Liberty* v. *California Coastal Com., supra,* 113 Cal.App.3d 491; and *Arnel Development Co.* v. *City of Costa Mesa* (1981) 126 Cal.App.3d 330

[178 Cal.Rptr. 723]; see also, *Georgia-Pacific Corp.* v. *California Coastal Com., supra,* 132 Cal.App.3d 678, 701, holding that an access condition must bear some reasonable relationship to the project.)

The California Court of Appeal below applied this standard in reviewing the Commission's decision. Relying on *Associated Home Builders, etc., Inc.* v. *City of Walnut Creek, supra,* 4 Cal.3d 633, *Grupe* v. *California Coastal Com., supra,* 166 Cal.App.3d 148, and *Remmenga* v. *California Coastal Com., supra,* 163 Cal.App.3d 623, the court held imposition of the access condition was valid, noting that while the Nollans' project alone has not created the need for access to the tidelands fronting their property, "it is a small project among many others which together limit public access to the tidelands and beaches of the state and, therefore, collectively create a need for public access." (JA 425.) Much like the wheat farmer in *Wickard* v. *Filburn, supra,* 317 U.S. 111, whose contribution alone to the demand for wheat was trivial but when combined with others like his was not, the Nollans' contribution to the need for public access, taken together with that of many others similarly situated, will be far from trivial. (See *Grupe* v. *California Coastal Com., supra,* 166 Cal.App.3d at p. 167.)

C. The Land Use Regulation in Question Serves the Important Public Purpose of Allowing Public Access to Publicly Owned Tidelands.

In imposing the access condition in question, appellee Commission was acting pursuant to the authority vested in it by the California Legislature under the California Coastal Act of 1976. (Cal. Pub. Resources Code, §30000 et seq.) The Coastal Act of 1976 is the legislative continuation of the coastal protection afforded by the initiative which created the California Coastal Zone Conservation Act of 1972. (Cal. Pub. Resources Code, §27000 et seq.) The Coastal Initiative was prompted by growing public concern over protection and preservation of coastal resources from the impacts of increased development.

> " 'The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer.' (*Selby Realty Co.* v. *City of San Buenaventura,* 10 Cal.3d 110, 120 [109 Cal.Rptr. 799, 514 P.2d 111].) This is particularly true of our 1,000-mile coastline. Visual, as well as physical, access to large segments of our beaches has been obstructed by residential, commercial and industrial development. . . ." (*CEEED* v. *California Coastal Zone Conservation Com.* (1974) 43 Cal.App.3d 306, 321 [118 Cal.Rptr. 315].)

One of the primary goals of the Coastal Initiative was to increase public access to the shore. As the California Supreme Court observed:

> "In recent decades, the People of California have become painfully aware of the deterioration in the quality and availability of recreational opportunities along the California coastline due to the combined factors of an increasing demand for its use and the simultaneous decreasing supply of accessible land in the coastal zone. Growing public consciousness of the finite quantity and fragile nature of the coastal environment led to the 1972 passage of Proposition 20, an initiative measure entitled the California Coastal Zone Conservation Act (the 1972 Coastal Act). . . ." (*Pacific Legal Foundation* v. *California Coastal Com., supra,* 33 Cal.3d 158, 162.)

In enacting the Coastal Act of 1976, the Legislature continued the coastal protection afforded by the Coastal Initiative. In keeping with the prior mandate of the People, one of the principal objectives of the 1976 Coastal Act is to preserve existing public rights of access to the shoreline and to expand public access for the future. (*Pacific Legal Foundation* v. *California Coastal Com., supra,* 33 Cal.3d at p. 163.)

There has long been a strong public policy in California in favor of allowing public access to shoreline areas for public purposes. (Cal. Const., art. X, §4; *County of Los Angeles* v. *Berk* (1980) 26 Cal.3d 201, 222 [161 Cal.Rptr. 742, 605 P.2d 381]; *Gion* v. *City of Santa Cruz* (1970) 2 Cal.3d 29, 42-43 [84 Cal.Rptr. 162, 465 P.2d 50].) This policy is founded on the need to assure the public's ability to use tidelands along the coast. Those tidelands are sovereign lands which are held in trust by the state for public uses including the right to fish, hunt, bathe, swim, use for boating and general recreational purposes. (*Marks* v. *Whitney* (1971) 6 Cal.3d 251, 259 [98 Cal.Rptr. 790, 491 P.2d 374].) As the California Legislature and the courts have recognized, public ownership and the concomitant right to use the tidelands are worthless without the ability to reach those lands. The ability to reach the tidelands contemplates not only access to the shore but along the shore enabling the public to reach and use its tidelands located both up and down coast. (See JA 318-319, 326.)

Thus, the access condition is rationally related to the important public purpose of ensuring access to the tidelands. The condition both satisfies the need for public access and alleviates the burdens resulting from the cumulative impacts of new development in the Faria Beach area.

D. The California Legislature Has Determined That Public Access Conditions Are Appropriate in New Development Projects.

In enacting the Coastal Act, the Legislature determined that public access conditions should be imposed on new development projects. The Legislature found and declared that the coastal zone is a distinct and valuable natural resource of vital and enduring interest to all the people and that future developments that are carefully planned and developed consistent with the Act are essential to the economic and social well-being of the people of the state. (Cal. Pub. Resources Code, §30001.) The Legislature declared that a basic goal of

the state is to maximize public access to and along the coast. (Cal. Pub. Resources Code, §30001.5, subd. (c).) Section 30212 of the Coastal Act, subdivision (a), provides that "public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby or (3) agriculture would be adversely affected." The Legislature had ample basis on which to conclude that construction of new developments between the first public road and the coast would cumulatively adversely impact the public's constitutional right of access to the tidelands. Government studies have demonstrated that hundreds of miles of publicly owned tidelands have been walled off from public access by private development. (See *Remmenga* v. *California Coastal Com., supra*, 163 Cal.App.3d 623, 630.) As this Court has repeatedly held, a Legislature's factual determinations supporting a statute may not be judicially questioned if the Legislature could reasonably believe them to be true. (*Minnesota* v. *Clover Leaf Creamery Co.* (1981) 449 U.S. 456; *Vance* v. *Bradley* (1979) 440 U.S. 93; see also *Day-Brite Lighting, Inc.* v. *Missouri* (1952) 342 U.S. 421.) In reviewing police power regulations, this Court has made clear that the court does not sit as a super legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. (*Day-Brite Lighting, Inc.* v. *Missouri, supra*, at p. 423.) It is not the function of the courts to substitute their evaluation of legislative facts for that of the Legislature. (*Minnesota* v. *Clover Leaf Creamery Co., supra*, 449 U.S. at p. 470.)

The police power is not confined to a narrow category; it extends to all the great public needs. (*Day-Brite Lighting, Inc.* v. *Missouri, supra*, 342 U.S. at p. 424.) Public access to public tidelands and coastal resources is a compelling public need. (See *Pacific Legal Foundation* v. *California Coastal Com.*,

supra, 33 Cal.3d at p. 162.) Absent access to the tidelands, the public can neither use nor enjoy the property it owns. In recognition of this fact, Congress has declared it is the national policy to encourage and assist states to develop and implement coastal management programs which include provisions for public access to the coasts. (16 U.S.C. §1452(2)(D).) The California Legislature's determination of the need for public access in new development projects should not be set aside.

IV

IMPOSITION OF THE ACCESS CONDITION DOES NOT RESULT IN TAKING OF APPELLANTS' PROPERTY.

A. The Nollans' Property Interest Is Subject to the State Constitutional Provision Protecting Public Access to the Tidelands.

In a "takings" case, one of the first questions to be answered is whether there is a property interest which is protected by the Fifth Amendment to the United States Constitution. (*Ruckelshaus* v. *Monsanto Co.* (1984) 467 U.S. 986, 1000.) As this Court has recognized:

> "Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ." (*Board of Regents* v. *Roth* (1972) 408 U.S. 564, 577.)

A mere unilateral expectation or abstract need is not a property interest entitled to protection. (*Webb's Fabulous Pharmacies, Inc.* v. *Beckwith* (1980) 449 U.S. 155, 161.) The Nollans assert they have been deprived of the right to exclude others because of the Commission's decision. (Brief for Appellants, p. 21.) However, since its adoption in 1879, the California Constitution has prohibited beachfront owners from excluding the public's

right of way to the tidelands wherever necessary for a public purpose. (Cal. Const., art. X, § 4, included in the Appendix.) This guarantee of the public right of way to the tidelands has been recognized by the courts. (*Henry Dalton & Sons Co.* v. *Oakland* (1914) 168 Cal. 463; *People* ex rel. *Younger* v. *County of El Dorado* (1979) 96 Cal.App.3d 403, 406 [157 Cal.Rptr. 815]; *Lane* v. *City of Redondo Beach* (1975) 49 Cal.App.3d 251, 255-257 [122 Cal.Rptr. 189].) It is the basis for the public access provisions in the California Coastal Act. (Cal. Pub. Resources Code, §30210.)

When the Nollans acquired their beachfront property, one of the strands lacking in their bundle of property rights was the ability to exclude the public from access to the tidelands. (See *Andrus* v. *Allard* (1979) 444 U.S. 51, 65-66.) State law does not allow an owner whose property abuts navigable waters to exclude the public where access is necessary for a public purpose. Thus, under California law, the "property right" which the Nollans claim was taken does not exist. The public purpose of access to the tidelands is undoubted, and a beachfront property owner who is required to recognize the public's right to access as a condition of a development permit is simply not deprived of any property right under state law. The Commission's decision required the Nollans to acknowledge and not interfere with the public's use of the beach. This preserved the public's right, guaranteed by the State Constitution, of access to the tidelands. The Commission's decision did not deprive the Nollans of any property right.

B. Contrary to Appellants' Assertions, This Is Not a So-Called Physical Invasion Case.

Even if the condition had affected a property right, there has still been no "taking." Appellants have characterized the Commission's decision as resulting in a physical invasion of their property and hence a taking for which compensation is due. In so doing, appellants attempt to align this case with

prior decisions of this Court holding uncompensated physical invasions impermissible. However, as amicus United States agrees, this traditional line of "physical invasion" cases is inapposite to a police power permit regulatory case such as the present one. (Brief on behalf of the United States, p. 15.)

Traditional physical invasion cases involve situations where government authorizes use of private property without any action by the property owner. These cases do not involve permit situations where, in exchange for permission to use private property, the property owner is asked to offset the burdens the use will create or contribute to by allowing public use of portions of his property.

In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, (1982) 458 U.S. 419, this Court found a physical invasion of private property required compensation. However, in *Loretto*, the property owner took no action which could trigger the police power of the State of New York. New York had enacted a statute which permitted cable television companies to install cables on apartment buildings to serve the tenants but without paying the owners of the buildings for the space occupied by the cables. This Court found that authorizing the cable companies to use private property without compensation to the owner constituted a taking. The case did not involve a permit situation like this one where the property owner seeks governmental authorization to effect a change in his property, and, in approving this change, the government attaches conditions to its approval. As this Court noted in *Loretto*, an easement of passage does not amount to a taking *per se*. (*Id.* at pp. 428-429, 433.)[8] (See also, *United States* v. *Causby* (1945) 328 U.S. 262—government flight path over chicken ranch resulting in loss of use for any purpose constituted a taking.)

[8]As the Solicitor General points out, the access condition in question differs from the cable placement in *Loretto*. It does not qualify as permanent in nature or as a physical occupation of private property since the public only obtains the right to pass and repass. (Brief for the United States, pp. 14-15.)

The difference between traditional physical invasion cases and regulatory police power cases lies in the concept of fairness. In traditional physical invasion cases, the property owner is forced to unfairly shoulder a burden that should properly be borne by the public. (See, *Penn Central Transp. Co.* v. *New York City*, *supra*, 438 U.S. 104, 123.) In a regulatory police power case, the property owner is asked to share in alleviating the public burden his project will create, or contribute to. The fairness lies in protecting the public from the actions of the property owner. The public should not be asked to unfairly shoulder the burdens created by private property owners.

The case of *Kaiser Aetna* v. *United States*, *supra*, 444 U.S. 164, is perhaps most illustrative of the difference between valid regulatory conditions and improper physical invasions. Kaiser Aetna sought approval from the Corps of Engineers to dredge a private pond and create a private marina. The pond was not considered part of the navigable waters of the United States. The Corps advised Kaiser Aetna that permits for this activity were unnecessary. Subsequently, the Corps asserted that Kaiser Aetna could not preclude the public from the marina because it had become part of the navigable water of the United States, despite the fact that Kaiser Aetna had invested millions of dollars on the assumption the marina would remain private. In upholding Kaiser Aetna's challenge to the Corps' assertion, this Court noted:

> "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation. But what petitioners now have is a body of water that was private property under Hawaiian law, linked to navigable water by a channel dredged by them with the consent of the Government. While the consent of individual officials representing the United States cannot 'estop' the United

States, [citations omitted], it can lead to the fruition of a number of expectancies embodied in the concept of 'property'—expectancies that, if sufficiently important, the Government must condemn and pay for before it takes over the management of the landowner's property. . . ." (*Id.* at p. 179.)

Unlike *Kaiser Aetna*, the Nollans' expectancy of continued private use of their beach is unfounded. The Nollans not only purchased their property knowing the public has a constitutionally guaranteed right of access to the adjacent tidelands, they purchased the land after the Commission's permit decision. Unlike *Kaiser Aetna*, no expectation of continued private use was led to fruition by government. Quite the contrary, the Nollans were fully informed of the Commission's obligation to require them to permit public use of their beachfront as a condition of development approval long before they purchased their lot and built their new house. Striking the access condition now would result in an absolute windfall to the Nollans and a detriment to the public.

Merely characterizing the Commission's decision as amounting to a "physical invasion" does not make it a taking for purposes of this Court's analysis. (See, *Grupe* v. *California Coastal Com.*, *supra*, 166 Cal.App.3d at p. 176.) As this Court recognized in *Pruneyard Shopping Center* v. *Robins*, *supra*, 447 U.S. 74, 84, not every assertion of physical invasion is determinative of whether a taking has occurred. None has occurred here.

C. Analysis of the Factors Which This Court Has Previously Identified As Significant to Finding a Taking Discloses There Has Been No Taking of Appellants' Property.

This Court has identified several factors which are significant to a takings analysis. (*Penn Central Transp. Co.* v. *New York City*, *supra*, 438 U.S. 104.) These are (1) the nature of the governmental action, (2) the economic impact of the regulation, and (3) the extent to which the regulation interferes with reasonable investment-backed expectations. (*Id.* at pp. 124-125; *Kaiser Aetna* v. *United States*, *supra*, 444 U.S. at pp. 174-175; *Ruckelshaus* v. *Monsanto Co.*, *supra*, 467 U.S. 986.) Applying these factors establishes there has been no taking of the Nollans' property.

1. The Nature of the Governmental Action in Question Is the Protection of Constitutionally Guaranteed Public Rights.

The decision of the Commission was made to protect the public's right of access to the tidelands, guaranteed by the State Constitution, from the adverse impacts of the Nollan project. (JA 65-66.) In analyzing whether governmental action has "gone too far," this Court has recognized that the nature of the action in question is particularly significant. Here, the nature of the governmental action was the protection of public resources and constitutional rights. Consequently, the government must be afforded broad latitude in its action.

This Court has previously acknowledged the ability of a state to exercise its police power and its sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution. (*Pruneyard Shopping Center* v. *Robins*, *supra*, 447 U.S. at p. 81; *Cooper* v. *California* (1967) 386 U.S. 58.) In *Pruneyard*, the California Supreme Court had interpreted the State Constitution as requiring the owner of a shopping center to permit members of the public to exercise their rights of free expression and petition

on the center's premises. This Court affirmed, holding that even though the result might be considered a "physical invasion" of the shopping center's property, the center had failed to demonstrate that the right to exclude the public was so essential to the use or economic value of the property that the state-authorized limitation of it amounted to a taking. (*Id.* at p. 84.) A similar result must obtain here.[9]

The evidence before the Commission emphatically demonstrated the impacts that would result from the Nollans' project. The increase in development and high structure densities results in impacts on existing public access. The eroding nature of the Faria Beach, the overcrowding of existing facilities and loss of open space have limited public access. Increased development will only exacerbate these problems. (JA 57-66, 255-260.) The deprivation of visual access will also impede physical access. As the evidence shows, loss of visual access means the public will not be aware of access opportunities. If the public cannot see the coast, the public will not use it. (JA 62-66, 161-200, 221-254.) Other areas will become increasingly crowded as a result. Based on the mass of evidence before it, the Commission properly found the Nollans' construction of the new house constituted new development pursuant to the Coastal Act of 1976 and that the burdens on public access resulting from the construction, along with other projects like it, required provision for public access. (JA 47-68; see discussion of evidence in the Statement of the Case.)

[9]The California court had noted that it was not confronted with an individual property owner but rather with a large retail business actively seeking patrons. (*Pruneyard Shopping Center* v. *Robins, supra*, 447 U.S. at p.78.) It is important to remember that the shopping center had not sought in any way to impinge upon public rights except by denying entry. It was not a case where the actions of the property owner would burden or adversely affect the public's rights. Here, the Nollans' construction of the new house will impact public rights quite apart from merely excluding the public from the private beach.

2. The Nollans Have Not Been Deprived of All Economic Use or Value of Their Property.

The Nollans have already built the new house, albeit unlawfully, which was the subject of their coastal permit application. (Juris. State., p. 5, fn. 1.) Obviously they have not been deprived of the use of their property.

The access condition as approved by the Commission required the Nollans to acknowledge the right of the public to use the beach between the mean high tide line and the seawall. (JA 46.) It does not preclude the Nollans from using the beach. Contrary to the Nollans' strident arguments, their use of the beach will not be hindered. (See Appellants' Brief on the Merits, p. 20.) Barbecues, volleyball games and the like would still be possible to the extent they are at present. (See JA 268-269.) The Nollans would simply need to let the public walk past them along the beach. Given the narrowness of the beach and the frequency with which it is inundated by wave action, the Nollans' use of the beach will, in all likelihood, not change. (JA 61.) Since all of the Nollans' development was constructed landward of the seawall (JA 26), the public's use of the beach seaward of the seawall will not interfere with the Nollans' use of their new house. Given their admission that they have previously permitted the public to use their beach, it is apparent that such use does not interfere with the Nollans' use of their property. (JA 303.)[10]

This is not a situation where the property owner has been denied a permit or denied the use of property. (Compare *Martino* v. *Santa Clara Valley Water Dist.* (9th Cir. 1983) 703 F.2d 1141 and *Williamson Planning Comm'n* v. *Hamilton Bank* (1985) 473 U.S. ____ [87 L.Ed.2d. 126, 105 S.Ct. 3108].) Furthermore, as the court below recognized, any diminution in value resulting from the access condition would not result in a taking since reasonable use of the property remains. (JA 425.)

[10]The Nollans will be protected from liability for public use by California Civil Code section 846 which shields property owners from liability for recreational use of their property by the public.

While the Nollans' property value may not be quite as high without a private beach, the Nollans are not losing all reasonable use or all economic use of their property since presumably their property is worth more with the new house than with the old one. (See, *Grupe* v. *California Coastal Com., supra,* 166 Cal.App.3d at pp. 175-176; *Whaler's Village Club* v. *California Coastal Com., supra,* 173 Cal.App.3d at p. 258.) As this Court has repeatedly stated, a mere diminution in the value of property does not result in a taking without just compensation. (*Penn Central Transp. Co.* v. *New York City, supra,* 438 U.S. at p. 131; *Euclid* v. *Ambler, supra* 272 U.S. 365; *Hadacheck* v. *Sebastian, supra,* 239 U.S. 394.)

The Nollans will actually benefit from the access condition and other similar conditions. The Nollans will be able to use all similar access in Faria and elsewhere along the coast, as members of the public. This reciprocity of advantage clearly benefits the Nollans. (See, Brief on Behalf of the United States, p. 8 fn. 28.)

3. The Access Condition Does Not Interfere With Any Reasonable Investment-Backed Expectation of the Appellants.

Appellants originally were lessees of their beachfront property. They did not exercise their option to purchase the lot until after the Commission's decision. (Juris. State., p. 5, fn. 1.) The access requirements of the Coastal Act had been in existence for over 10 years by the time the Nollans acquired their property, and Article X, section 4 of the California Constitution for over a hundred years. Under these circumstances, the Commission's decision could not interfere with reasonable investment-backed expectations. (*Ruckleshaus* v. *Monsanto Co., supra,* 476 U.S. 986). The timing of the Nollans' purchase alone is sufficient to defeat a taking. (*Andrus* v. *Allard, supra,* 444 U.S. 51, 64-65.)

Moreover, the access condition covers only that portion of their property between the seawall and mean high tide line of the ocean. (JA 46.) The evidence before the Commission reveals this area to be a maximum of 10 feet wide. (JA 83, 85-86; 262-264.) The width of the beach also fluctuates. (JA 61, 204.) The seaward boundary of the Nollans' property, the mean high tide line, moves with this fluctuation of the beach.[11] The evidence also strongly suggested the public had already acquired rights to use the property through long continued use without objection by the owners. (JA 68-71, 85-86, 289-290, see also declarations on public use found in the administrative record following remand at pp. 79-121.) The public owns the tidelands adjacent to the Nollans and has the concomitant right to use them, as well as the constitutionally guaranteed right of access thereto. (*Marks* v. *Whitney, supra,* 6 Cal.3d 251; Cal. Const., art. X, §4.) The Nollans have no right to exclude the public from the adjacent tidelands. (*Grupe* v. *California Coastal Com., supra,* 166 Cal.App.3d at pp. 171-172; *Whaler's Village Club* v. *California Coastal Com., supra,* 173 Cal.App.3d at p. 255.) Under these circumstances, the Nollans could have no reasonable investment-backed expectation of acquiring a beach free from public rights.

The judgment of the court below should be affirmed.

[11]The boundary between the tidelands and the uplands in California, the mean high tide line also often referred to as the ordinary high water mark, is ambulatory. It fluctuates with the changes in the beach. (See *Swarzwald* v. *Cooley* (1940) 39 Cal.App.2d 306, 313; Maloney and Ausness, *The Use and Legal Significance of the Mean High Water Line in Coastal Boundary Mapping* (1974) 53 No. Carolina L.Rev., pp. 185, 224-233.) This is true where the beach is in a natural condition. There were indications in the record that the beach in front of the Nollans' may not be in a natural condition. (JA 70, 79, 80, 83, 85, 86.) However, as the Senior Land Agent noted, further investigation would be necessary to determine this. (JA 85-86.) Based on the evidence, the Commission found the access condition appropriate to protect the potential public ownership of the beach. (JA 70-71.)

V

THE NOLLANS ARE NOT ENTITLED TO COMPENSATION.

If this Court determines that the access condition was improper, the appropriate remedy would be to remand the matter to allow the condition to be deleted. (*Agins* v. *Tiburon*, *supra*, 447 U.S. 255.) There is nothing in the Constitution that "prevents the government from electing to abandon" an improper or excessive regulation and thus eliminate a taking. (*Williamson Planning Comm'n* v. *Hamilton Bank*, *supra*, 473 U.S. ____ [105 S.Ct.3108, 3125] Stevens, J., concurring; *San Diego Gas & Electric Co.* v. *San Diego* (1981) 450 U.S. 621, 657, Brennan, J., dissenting.) There can be no question of whether the Nollans are entitled to any damages for undue regulation since they were never regulated. They built the house without the coastal permit, never satisfied the access condition, and never recorded the required deed restriction. The challenged access condition has never been applied to the Nollans because recordation of the deed restriction was a condition precedent to issuance of the coastal permit.

Thus, even if the access condition is inappropriate, the proper remedy is not compensation as the Nollans suggest, but rather a remand to allow the access condition to be deleted.

CONCLUSION

Either the appeal should be dismissed or the judgment of the California Court of Appeal should be affirmed.

DATED: February, 1987.

JOHN K. VAN DE KAMP
Attorney General

ANDREA SHERIDAN ORDIN
Chief Assistant Attorney General

N. GREGORY TAYLOR
Assistant Attorney General

ANTHONY M. SUMMERS
Supervising Deputy Attorney General

JAMEE JORDAN PATTERSON
Counsel of Record
Deputy Attorney General

Attorneys for Appellee
California Coastal Commission

APPENDIX

CALIFORNIA CONSTITUTION

Article X, Section 4

No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

CALIFORNIA PUBLIC RESOURCES CODE

§ 30001.5. Legislative findings and declarations; goals

The Legislature further finds and declares that the basic goals of the state for the coastal zone are to:

(a) Protect, maintain, and, where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources.

(b) Assure orderly, balanced utilization and conservation of coastal zone resources taking into account the social and economic needs of the people of the state.

(c) Maximize public access to and along the coast and maximize public recreational opportunities in the coastal zone consistent with sound resources conservation principles and constitutionally protected rights of private property owners.

(d) Assure priority for coastal-dependent and coastal-related development over other development on the coast.

(e) Encourage state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development for mutually beneficial uses, including educational uses, in the coastal zone.

§ 30105.5. Cumulatively; cumulative effect

"Cumulatively" or "cumulative effect" means the incremental effects of an individual project shall be reviewed in connection with the effect of past projects, the effects of other current projects, and the effects of probable future projects.

§ 30210. Access; recreational opportunities; posting

In carrying out the requirement of Section 4 of Article X of the California Constitution, maximum access, which shall be conspicuously posted, and recreational opportunities shall be provided for all the people consistent with public safety needs and the need to protect public rights, rights of private property owners, and natural resource areas from overuse.

§ 30211. Development not to interfere with access

Development shall not interfere with the public's right of access to the sea where acquired through use or legislative authorization, including, but not limited to, the use of dry sand and rocky coastal beaches to the first line of terrestrial vegetation.

§ 30212. New development projects

(a) Public access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects except where (1) it is inconsistent with public safety, military security needs, or the protection of fragile coastal resources, (2) adequate access exists nearby, or (3) agriculture would be adversely affected.

Dedicated accessway shall not be required to be opened to public use until a public agency or private association agrees to accept responsibility for maintenance and liability of the accessway.

(b) For purposes of this section, "new development" does not include:

(1) Replacement of any structure pursuant to the provisions of subdivision (g) of Section 30610.

(2) The demolition and reconstruction of a single-family residence; provided, that the reconstructed residence shall not exceed either the floor area, height or bulk, of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property as the former structure.

(3) Improvements to any structure which do not change the intensity of its use, which do not increase either the floor area, height, or bulk of the structure by more than 10 percent, which do not block or impede public access, and which do not result in a seaward encroachment by the structure.

(4) The reconstruction or repair of any seawall; provided, however, that the reconstructed or repaired seawall is not seaward of the location of the former structure.

(5) Any repair or maintenance activity for which the commission has determined, pursuant to Section 30610, that a coastal development permit will be required unless the commission determines that the activity will have an adverse impact on lateral public access along the beach.

As used in this subdivision, "bulk" means total interior cubic volume as measured from the exterior surface of the structure.

(c) Nothing in this division shall restrict public access nor shall it excuse the performance of duties and responsibilities of public agencies which are required by Sections 66478.1 to 66478.14, inclusive, of the Government Code and by Section 4 of Article X of the California Constitution.

REPLY BRIEF

Supreme Court, U.S.
FILED
MAR 20 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

APPELLANTS' REPLY BRIEF

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Appellants

Appeal Docketed July 29, 1986
Probable Jurisdiction Noted October 20, 1986

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES CITED	ii
I. THE CALIFORNIA COURT OF APPEAL FAILED TO APPLY THE REQUIRED "TAKING" ANALYSIS	2
II. UNDER CALIFORNIA LAW THE NOLLANS HAVE THE RIGHT TO EXCLUDE OTHERS FROM USING THEIR PROPERTY FOR ACCESS TO THE OCEAN	3
III. A "TAKING" IS NOT EXCUSED BECAUSE IT IS ACCOMPLISHED THROUGH A REGULATORY PERMIT PROCESS	7
A. A "Taking" Is Not Determined by the Process Employed To Confiscate the Nollans' Property	7
B. The Regulatory Permit Process Provides No Compensation to the Nollans	8
C. The Use of a Regulatory Permit to Confiscate Property Is an Unfair Procedure Which Leads to Unjust Results	10
IV. UNDER THE CIRCUMSTANCES OF THIS CASE THE EXACTION OF A PUBLIC RIGHT-OF-WAY ACROSS THE NOLLANS' PROPERTY IS A "TAKING"	11
A. The Nollans Will Suffer a Physical Invasion	12
B. The Property Interest Being Taken from the Nollans Is One the Government Is Normally Expected To Condemn and Pay For	14
C. The Commission's Action Is Not a Prohibition on Use	15
D. The Nollans Had Investment Backed Expectations in the Privacy of the Residence	15

TABLE OF CONTENTS—Continued

Page

E. The Commission Imposed the Permit Condition with the Intent of Taking Property from the Nollans for Public Use 16

F. No Special Reason Exists To Burden the Nollans with the Full Cost of Establishing Public Use of Their Beach Property 17

CONCLUSION 19

APPENDIX ..... App. 1

TABLE OF AUTHORITIES CITED

Page

CASES

Agins v. City of Tiburon, 24 Cal. 3d 266 (1979), aff'd on other grounds, 447 U.S. 255 (1980) 10

Aptos Seascape Corp. v. County of Santa Cruz, 138 Cal. App. 3d 484 (1982) 5

Bolsa Land Co. v. Burdick, 151 Cal. 254 (1907) 4

City of Oakland v. Oakland Water Front Co., 118 Cal. 160 (1897) 4

Dickman v. Commissioner, 465 U.S. 330 (1984) 9

Federal Communications Commission v. Florida Power Corporation, — U.S. —, 55 U.S.L.W. 4236 (decided Feb. 25, 1987) 13

Frost v. Railroad Commission, 271 U.S. 583 (1926) 8

Georgia-Pacific Corporation v. California Coastal Commission, 132 Cal. App. 3d 678 (1982) 10

Gion v. City of Santa Cruz, 2 Cal. 3d 29 (1970) 5

Griggs v. County of Allegheny, 369 U.S. 84 (1962) 13

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 11

Heist v. County of Colusa, 163 Cal. App. 3d 841 (1984) 6

Henry Dalton & Sons v. Oakland, 168 Cal. 463 (1914) ... 6

Hughes v. Washington, 389 U.S. 290 (1967) 7

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 3, 8

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949) 13

Lane v. City of Redondo Beach, 49 Cal. App. 3d 251 (1975) 6

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 7, 8, 13, 16

TABLE OF AUTHORITIES CITED—Continued

Page

Marcus Brown Holding Co. v. Feldman, 256 U.S. 170 (1921) 7

McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879 (1953) 4, 5

Pacific Legal Foundation v. California Coastal Commission, 33 Cal. 3d 158 (1982) 10

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) ..... *Passim*

People ex rel. Younger v. County of El Dorado, 96 Cal. App. 3d 403 (1979) 5, 6

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 13

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 8

Sea Ranch Association v. California Coastal Commission, 552 F. Supp. 241 (N.D. Cal. 1982) 10

Southern California Edison Co. v. Bourgerie, 9 Cal. 3d 169 (1973) 14

United States v. Appalachian Electric Power Co., 311 U.S. 377 (1940) 9

United States v. Causby, 328 U.S. 256 (1946) 7, 13

United States v. Cress, 243 U.S. 316 (1917) 7

United States v. Fuller, 409 U.S. 488 (1973) 9

United States v. General Motors Corp., 323 U.S. 373 (1945) 7

United States v. Kaiser Aetna, 408 F. Supp. 42 (D. Hawaii 1976) 8

United States v. Pewee Coal Co., 341 U.S. 114 (1951) ... 13

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 14, 16, 17

TABLE OF AUTHORITIES CITED—Continued

Page

Whaler's Village Club v. California Coastal Commission, 173 Cal. App. 3d 240 (1985) 10

Wickard v. Filburn, 317 U.S. 111 (1942) 18

Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. —, 105 S. Ct. 3108 (1985) 17

Withrow v. Larkin, 421 U.S. 35 (1975) 19

Youakim v. Miller, 425 U.S. 231 (1976) 3

STATUTES

Cal. Civ. Code § 654 (West's 1982) 9

Cal. Pub. Res. Code § 30105.5 (West's 1986) 18

§ 31106 (West's 1986) 11

MISCELLANEOUS

41 Ops. Cal. Att'y Gen. 39 (1963) 4

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

APPELLANTS' REPLY BRIEF

In the Brief for Appellee the commission abandons the decision of the California Court of Appeal and strikes off on its own. It proposes a novel taking "test," thereby admitting that the Court of Appeal did not provide a meaningful "taking" analysis, even from the commission's perspective.

When it comes to the facts, the commission's brief portrays a different case than the one at bar. It advances theories concerning prescriptive rights that were not presented to the court below. It misrepresents the Nollans' rights of ownership. It even makes factual contentions about the property that are contrary to the findings of

both courts below and contrary to *admissions* which it made in its answer to the Nollans' complaint.

Another startling aspect of the Brief for Appellee is the commission's repeated arguments that strong public policy for beach access justifies the abridgment of individual rights. These arguments reveal that the commission does not object to the replacement of one small family home on a single lot which has been in use for residential purposes for half a century. It is only the Nollans' private ownership of the beach area which the commission finds contrary to public policy. To justify taking the beach for public use the commission characterizes the Nollans' unremarkable act of replacing an existing house on private property as an unfair burden on society. It is important to bear in mind that the Nollans do not stand in the way of the state acquiring their beach if it wants to. They ask only that their individual rights be protected in the process.

I

THE CALIFORNIA COURT OF APPEAL FAILED TO APPLY THE REQUIRED "TAKING" ANALYSIS

The Brief for Appellee concedes the first question presented by this appeal. At Page Nos. 14-15 of its brief, the commission sets out its "test for the validity" of a permit condition. The Nollans disagree that a "taking" analysis is limited to any such set formula. Nonetheless, that "test" clearly calls for the state court to apply both a police power analysis and a *separate* analysis of the question of whether a "taking" resulted. Thus the commission agrees with the Nollans' principal contention that the California Court of Appeal, having determined that the permit condition was a valid exercise of the police power, was obligated then to consider the separate question of whether the condition constituted a "taking" of the Nollans' property. Jurisdictional Statement at i, 15-19; Brief of Appellants at 30-36.

The controversy on this question is now reduced to whether the California Court of Appeal did apply the

required "taking" analysis. It did not. *See* Brief of Appellants at 30-36. On this issue, the commission takes an ambivalent position. Initially the commission argues that the Court of Appeal did not consider the federal "taking" issue. Brief for Appellee at 12.[1] In an ambiguous footnote, the commission then suggests that the Court of Appeal did recognize the "taking" issue, cited a taking analysis in a different case, and "incorporated that analysis by reference." Brief for Appellee at 12 n.5. Either of these contradictory positions recognizes that the Court of Appeal did not follow the dictates of this Court which require that a taking analysis be an "essentially ad hoc, factual inquir[y]" into the facts of the particular case. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979).

II

UNDER CALIFORNIA LAW THE NOLLANS HAVE THE RIGHT TO EXCLUDE OTHERS FROM USING THEIR PROPERTY FOR ACCESS TO THE OCEAN

The commission totally misrepresents California law by claiming that, due to Article X, Section 4 of the California Constitution, the Nollans lack the property right to exclude the public from crossing their private property. Brief for Appellee at 26-27. California law is exactly opposite.[2]

The California Supreme Court has repeatedly recognized that owners of private property located adjacent

---

[1] The Nollans will not elaborate on their previous response to the commission's erroneous claim that the federal issues were not raised in the courts below. *See* Response of Appellants to Motion of Appellee, California Coastal Commission, to Dismiss dated December 9, 1986, at 3-7.

[2] The commission's claim that the Nollans lack the right to exclude the public from their property is a question not raised or resolved in the courts below. "'It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.'" *Youakim v. Miller*, 425 U.S. 231, 234 (1976).

to tidelands can exclude the public from crossing their property.

> "It is true that private ownership of the shore may prevent access to the navigable waters of the bay, but so does the private ownership of the upland prevent access to the shore and to the navigable waters in the same sense and to the same extent. . . . By the exercise of the right of eminent domain all necessary means of access from the uplands to the waterfront may be condemned for the public use . . . ." *City of Oakland v. Oakland Water Front Co.*, 118 Cal. 160, 185 (1897).

The California Supreme Court also spoke on this subject in *Bolsa Land Co. v. Burdick*, 151 Cal. 254 (1907). Plaintiffs in that case sued defendants for trespass after defendants repeatedly crossed plaintiffs' property to reach Bolsa Bay.

> "Whether or not Bolsa Bay ever was, or, if it ever was, whether it is now, part of the navigable waters of the state, defendants certainly have no right to invade private property to gain access thereto. If to approach such waters a right of way becomes necessary over private lands, such right of way does not run to the public with the use of the waters. It must be condemned and paid for by the public, as must any other right of way for public use." *Id.* at 260.[3]

The California Supreme Court has more recently confirmed the principle of these cases. In *McCarthy v. City of Manhattan Beach*, 41 Cal. 2d 879 (1953), the court denied compensation to an oceanfront owner whose property was rezoned for recreational beach use only. The court based its decision on the "presumption" that the owner could fence off his beach and charge an admission

[3] "In spite of the sweeping provisions of Article XV, section 2 of the Constitution [now Article X, Section 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tidewaters for the purpose of commerce, navigation or fishing." 41 Ops. Cal. Att'y Gen. 39, 41 (1963). *See also* JA 208-09, 235, 238.

fee for public entry. *Id.* at 892. *Gion v. City of Santa Cruz*, 2 Cal. 3d 29 (1970), addressed the question of the public's right to use a privately owned, unimproved dirt road to the beach. *Id.* at 36. The court found that the public had the right to use the road only because previous owners, by failing to exclude the public for the requisite period, had "impliedly dedicated the property to the public." *Id.* at 44.

In a recent case, *Aptos Seascape Corp. v. County of Santa Cruz*, 138 Cal. App. 3d 484 (1982), the California Court of Appeal rejected the argument now made by the commission that "the beach up to the highest high water mark is burdened with a 'public servitude' similar to the 'public trust easement.'" *Id.* at 505. The court held:

> "In light of *City of Los Angeles v. Venice Peninsula Properties, supra*, 31 Cal. 3d 288, we conclude that the trial court correctly concluded that Seascape's property was not subject to any servitude. In that case, the court held that the public trust doctrine applies to tidelands . . . . As already explained, 'tidelands' are lands between the lines of mean high tide and mean low tide. (*Marks v. Whitney, supra*, 6 Cal. 3d at pp. 257-258.) Nothing in *City of Los Angeles* supports the notion that the public's rights . . . extended *beyond* the tidelands to the highest high water line, as the County would have this court hold." 138 Cal. App. 3d at 505-06 (emphasis in original).

The dedication sought by the commission would open the Nollans' land from the mean high tide line to their seawall, or, in other words, to the highest high water mark. *See* Brief for Appellee at 5. *Aptos Seascape* thus directly refutes the commission's claim, that "the 'property right' which the Nollans claim [over this area] . . . does not exist."[4] Brief for Appellee at 27.

None of the cases cited by the commission stands for the proposition it asserts. *People ex rel. Younger v.*

[4] The holding of this case also disposes of the claims by some amici that the California "public trust" doctrine extends to the Nollans' property.

County of El Dorado, 96 Cal. App. 3d 403 (1979), overturned a county ordinance which attempted to outlaw rafting on the American River. The question of whether the public has a constitutional right to cross private property to reach the water was simply not an issue in the case. However, the court did observe that because "[m]ost of the land on both sides of the river is privately owned . . . *access to the water is limited*," *id.* at 405 (emphasis added), thus acknowledging that the public has no general right to reach the water by crossing private property.

The commission also cites *Henry Dalton & Sons v. Oakland*, 168 Cal. 463 (1914), another case which, if anything, disproves their position. No claim of a right to cross *plaintiff's* private property was presented. The case merely involved plaintiff's claim of a right of access across tidelands held as public property by the *city*. On that issue plaintiff (a member of the public) lost.

Last of all, the commission cites *Lane v. City of Redondo Beach*, 49 Cal. App. 3d 251 (1975). *Lane* is another case involving access over *public* property. In *Lane* plaintiffs challenged a redevelopment plan under which the City of Redondo Beach vacated certain city streets leading to the harbor. The court ruled that because the city is the trustee of the tidelands trust, it has a duty to provide public access to the navigable waters. 49 Cal. App. 3d at 257. *Lane*, like the others, nowhere discusses access across *private* property. In contrast to *Lane* the Court of Appeal in *Heist v. County of Colusa*, 163 Cal. App. 3d 841 (1984), reached the opposite result and approved the vacation of a public road which was separated from public trust lands by private property. The court found the road did not provide access to the water because the public had no right to trespass across private land. *Id.* at 851.

Given the lack of any authorities supporting its position and given the substantial authorities directly contradicting its claim, the commission's assertion that the Nollans lack the legal right under California law to

exclude members of the public from crossing their land is frivolous.

III

A "TAKING" IS NOT EXCUSED BECAUSE IT IS ACCOMPLISHED THROUGH A REGULATORY PERMIT PROCESS

A. A "Taking" Is Not Determined by the Process Employed To Confiscate the Nollans' Property

The commission argues that a right-of-way may be confiscated as an exaction affixed to a permit even though condemnation of the same right-of-way would require payment of just compensation. Brief for Appellee at 28-29. The method employed is irrelevant. A "taking" is determined by "the owner's loss," *United States v. Causby*, 328 U.S. 256, 261 (1946); *United States v. General Motors Corp.*, 323 U.S. 373, 375 (1945), or by "the character of the invasion." *United States v. Cress*, 243 U.S. 316, 328 (1917). A "taking" of property by any method and called by any name is still a "taking." "[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring) (emphasis in original).

The same argument was rejected by this Court in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The commission asserts that "in *Loretto*, the property owner took no action which could trigger the police power," Brief for Appellee at 28, but the commission is wrong. The law at issue in *Loretto* applied "only to buildings used as rental property." *Loretto*, 458 U.S. at 438. Offering real property for rent is a sufficient action "to trigger the police power" in New York. *See Marcus Brown Holding Co. v. Feldman*, 256 U.S. 170 (1921). In *Loretto* this Court expressly stated:

> "[A] landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation. . . . The right of a property owner to exclude a stranger's physical

occupation of his land cannot be so easily manipulated." 458 U.S. at 439 n.17.

The commission also claims that in *Kaiser Aetna, supra,* this Court impliedly approved of physical invasions as regulatory conditions. Brief for Appellee at 29-30. Again the commission is wrong. This Court disapproved the public access requirement. Kaiser-Aetna did have permits pending at the time before the Corps of Engineers (*United States v. Kaiser Aetna,* 408 F. Supp. 42, 45 (D. Hawaii 1976)), and it is clear that the existence of those pending permit applications did not change this Court's determination. The language cited by the commission only states that conditions "for the promotion of navigation" are appropriate if the actions of the permittee "have impaired navigation." *Kaiser Aetna,* 444 U.S. at 179. The Nollans have done nothing to impair access to the beach.

The commission's argument was also rejected in *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984), where the Environmental Protection Agency (EPA) claimed that under the comprehensive registration scheme in the statute it could require Monsanto to relinquish its property rights in certain scientific data. This Court held that EPA could not use the licensing process to preempt Monsanto's property rights, noting that if the statute could authorize EPA to use its regulatory power to destroy property rights recognized under state law, "the Taking Clause has lost all vitality." *Id.* at 1012. The same limitation has been applied to the states. Property which a state cannot take by express divestment it cannot take "under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold." *Frost v. Railroad Commission,* 271 U.S. 583, 593 (1926).

B. The Regulatory Permit Process Provides No Compensation to the Nollans

The commission suggests that a "taking" by permit is excused because the property owners may receive some-

thing of value from the granting of a permit. Brief for Appellee at 15. This argument stands the law of property on its head. It is based on the fallacious premise that a permit creates the right of use of property. In California the right of use is inherent in the concept of property. Cal. Civ. Code § 654 (West's 1982). " 'Property is composed of constituent elements and of those elements the right to use the physical thing to the exclusion of others is the most essential and beneficial.' " *Dickman v. Commissioner,* 465 U.S. 330, 336 (1984) (quoting *Passailaigue v. United States,* 224 F. Supp. 682, 686 (M.D. Ga. 1963)). Coastal development regulation does not bestow the benefit of use on the property owner; it functions to restrict uses which would otherwise be permissible.[5] In the absence of the Coastal Act, the Nollans would have been free to rebuild their house without regard to the limitations imposed by that Act. The "permit" is merely advanced certification that the project as proposed complies with the limitations imposed by the statute.[6]

---

[5] Since this Court has repeatedly ruled that the loss of development rights through regulation does not require compensation, *see, e.g., Penn Central, supra,* it would be the ultimate irony if a decision not to restrict those same development rights were to be considered just compensation for the taking of other property interests.

[6] Permits, such as a coastal development permit, which merely certify compliance with regulations are to be distinguished from permits which actually grant a true benefit, such as use of public lands. *See, e.g., United States v. Fuller,* 409 U.S. 488, 489 (1973) (permits to graze cattle on federal domain). This distinction also makes *United States v. Appalachian Electric Power Co.,* 311 U.S. 377 (1940), inapplicable. "The flow of a navigable stream is in no sense private property." *Id.* at 424. Therefore, a permit to construct a dam across navigable waters to capture the economic benefits of the energy in the moving waters clearly grants a special benefit from a publicly owned resource. Moreover, in *Appalachian Electric Power* the statute provided compensation for at least the " 'net investment' " in any property taken by the government. *Id.* at 420 n.65. Therefore, the Court proceeded to "assume *without deciding* that . . . riparian rights may pass to the United States for less than their value." *Id.* at 427 (emphasis added).

C. The Use of a Regulatory Permit to Confiscate Property Is an Unfair Procedure Which Leads to Unjust Results

Unlike eminent domain proceedings, when the government acquires property through a regulatory exaction it encounters no cost unless the property owner marshals his or her courage and personal resources to commit to a long and costly legal challenge. Even if the property owner prevails the costs of litigation are usually not recoverable, *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal. 3d 158, 167 (1982), and compensation for the loss of use during the years of litigation is not available. *Agins v. City of Tiburon*, 24 Cal. 3d 266 (1979), *aff'd on other grounds*, 447 U.S. 255 (1980). Unless the value of the property taken clearly exceeds the substantial cost of modern day litigation, the property owner always loses. Government agencies are well aware that the typical costs of litigation far exceed the value of the typical property exaction from the small property owner who, therefore, has no reasonable choice but to relinquish his or her property to the state.[7] The exaction of property through permit conditions provides only the most affluent with any option for seeking justice. For the average property owner it is a fundamentally unfair procedure.

This case challenges the confiscation of a right-of-way across one very small piece of property. It does not question governmental authority to restrict property use or to require subdividers to build roads or develop

[7] In the most recent coastal access annual report, Footnote No. 8, *infra*, the commission at Page No. 14 reports that access conditions have been imposed on 2,080 permits and that accessways now total 52.64 *miles* in length. It is significant that the commission's opponents in litigation over coastal access rights-of-way are typically not small property owners but major corporations (*Georgia-Pacific Corporation v. California Coastal Commission*, 13[illegible] Cal. App. 3d 678 (1982)), and wealthy homeowner associations (*Sea Ranch Association v. California Coastal Commission*, 552 F. Supp. 241 (N.D. Cal. 1982), *Whaler's Village Club v. California Coastal Commission*, 173 Cal. App. 3d 240 (1985)).

parks serving their development. Brief for Appellee at 18-21. On the facts of this case the commission is taking property to further an established acquisition program not related to the Nollans' actions. There is no need to distort the regulatory process for this acquisition purpose. The power of eminent domain is coextensive with the police power. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984).[8] The government should be required to employ this ready option. The owner, of course, can be assessed a fair share of the costs of this action under the standards adopted by this Court for such assessments. *See* Brief of Appellant at 21-30.

IV

UNDER THE CIRCUMSTANCES OF THIS CASE THE EXACTION OF A PUBLIC RIGHT-OF-WAY ACROSS THE NOLLANS' PROPERTY IS A "TAKING"

This Court has rejected the concept of a "set formula" and emphasized that the determination of a "taking" claim requires the evaluation of all pertinent considerations in light of " 'the particular circumstances' " of each case. *Penn Central*, 438 U.S. at 124. Nonetheless the commission proposes a single, inflexible "test" for "the validity of a condition attached to development approval." Brief for Appellee at 14-15. The proposed "test" violates the teachings of this Court by focusing on matters other than the harm to the property owner. The government's

[8] California has authorized other agencies (not the commission) to use eminent domain to acquire beach access rights. Cal. Pub. Res. Code § 31106 (West's 1986). Funds have also been made available. JA 139. In January, 1987, the commission issued "Coastal Access Program, Seventh Annual Report," a joint report with the State Coastal Conservancy. This report states at Page No. 3:

> "Public acquisition of land for coastal access and recreational use has been funded primarily through voter-approved bond sales, the most recent in June, 1984, when voters approved the sale of bonds which provided $40.5 million to the Department of Parks and Recreation for coastal park acquisition and development and $35 million to the State Coastal Conservancy for coastal programs and grants."

"need" is given primary weight, including needs created not by the property owner but by "other similar projects." Individual property owners are to be lumped into groups and their rights evaluated only as an element of the collective whole. The effect on the individual property owner is downplayed so drastically that no distinction is recognized between a limitation on use and an intentional expropriation of property. Traditionally recognized "takings," including confiscation of fee ownership of an area of land, could easily pass the commission's "test" and require no compensation. This one-sided proposed "test" does not comport with the "takings" analysis described by this Court which provides the government with substantial latitude to restrict uses but prohibits the expropriation of recognized property interests.

In *Penn Central, supra,* this Court's review of the jurisprudence of the Fifth Amendment identified five factors which had been significant in the "ad hoc" analyses the Court had applied in a variety of circumstances to evaluate "taking" claims. These factors, when applied to the facts of this case, clearly show that the exaction of the right-of-way from the Nollans transgresses constitutional limits.

A. The Nollans Will Suffer a Physical Invasion

"A 'taking' may more readily be found when the interference with the property can be characterized as a physical invasion . . . ." *Penn Central,* 438 U.S. at 124.[9] The commission's claim that this case does not involve a physical invasion, Brief for Appellee at 27, is absurd. The only purpose for the right-of-way is to have people enter on and make use of the property. This Court has long recognized that intermittent or temporary entry by persons without consent by the owner constitutes a taking.

[9] The commission's characterization of its action as "protection of public resources," Brief for Appellee at 31, simply misses the point by describing the purpose for taking the right-of-way rather than the nature of the action taken to achieve that purpose.

Griggs v. County of Allegheny, 369 U.S. 84 (1962); *United States v. Pewee Coal Co.,* 341 U.S. 114 (1951); *Kimball Laundry Co. v. United States,* 338 U.S. 1 (1949); *United States v. Causby,* 328 U.S. 256. The commission makes no attempt to rationalize its argument with the contrary holdings of these cases. Only *Causby* is mentioned, and the citation misrepresents the holding by suggesting that a "taking" was found only because there was a "loss of use for any purpose." Brief for Appellee at 28. While the *Causby* analysis began by recognizing that a taking would certainly occur from the "supposed case" of a complete loss of use, on the *Causby* facts "enjoyment and use of the land are not completely destroyed." 328 U.S. at 262. A "taking" was found in *Causby* because the partial limitations on use "were the product of a direct invasion of respondents' domain." *Id.* at 265.

The commission's suggestion that this Court in *Pruneyard Shopping Center v. Robins,* 447 U.S. 74 (1980), indicated a willingness to countenance physical invasions, Brief for Appellee at 31-32, ignores the crucial distinction of the owners' consent to the entry. *See* Brief of Appellants at 16 n.10. The *Pruneyard* decision distinguishes the open, invited access of that case from closed, private areas. *Id.* at 84.[10] "[I]t is the invitation . . . that makes the difference. The line which separates these cases from *Loretto* is the unambiguous distinction between a commercial lessee and an interloper with a government license." *Federal Communications Commission v. Florida Power Corporation,* — U.S. —, 55 U.S.L.W. 4236, 4238 (decided Feb. 25, 1987). Those who enter and make use of the Nollans' property will be "interloper[s] with a government license."

[10] *Pruneyard* does not apply to this case for the additional reason that in that case the California Supreme Court had construed the California Constitution to create public rights to the use of private shopping centers. 447 U.S. at 81. In contrast California law protects the Nollans' rights to exclude strangers. *See* Argument II, *supra.*

B. The Property Interest Being Taken from the Nollans Is One the Government Is Normally Expected To Condemn and Pay For

The interests taken by the government must be "sufficiently bound up with the reasonable expectations of the claimant to constitute 'property' for Fifth Amendment purposes." *Penn Central,* 438 U.S. at 125. It is beyond dispute that the right-of-way demanded from the Nollans is, under most circumstances, the kind of property interest which is protected by the Just Compensation Clause. *See* Brief of Appellants at 21-22. "[T]he appropriation of the use of private property" is a "taking," *Webb's Fabulous Pharmacies, Inc. v. Beckwith,* 449 U.S. 155, 163-64 (1980). Under California law when an easement is created by "the appropriation of a mere right of way" it is "unquestionably compensable 'property.'" *Southern California Edison Co. v. Bourgerie,* 9 Cal. 3d 169, 172-73 (1973). Although the commission maintains that California law governing coastal property is different, Brief for Appellee at 26-27, the commission is wrong. *See* Argument II, *supra.*

The commission makes various attempts to belittle the importance to the Nollan family of their interest in excluding the general public from their yard. It argues that the area is "a maximum of 10 feet wide," Brief for Appellee at 35, that "the public had already acquired rights to use the property," *id.,* and that the Nollans had no right "to exclude the public" from the area. *Id.* at 27. These claims are not supported by any findings by the courts below. To the contrary the commission admitted the allegation in Paragraph No. 26 of the supplemental petition for writ of mandate that "[t]he area to be dedicated to public use . . . constitutes approximately 30% of petitioners' property." JA 334, 406. The trial court in both decisions found that the commission was taking the use of "approximately one-third of the property." JA 37, 414. The commission expressly declined to decide whether a public right of use existed. JA 45, 47, and did not raise as an affirmative defense any claim of a right

of use or other interest in the property. JA 410-11. Although the public has access along the tidelands at Faria Beach, the Nollans' reasonable expectation that the public would not have a right-of-way across their adjacent property is firmly supported by California property law. This case was decided in the courts below on the basis that the Nollans' fee title is no less of a property interest than any other fee ownership and that the public right-of-way would extend across approximately one-third of their property area.

C. The Commission's Action Is Not a Prohibition on Use

Governmental action "prohibiting particular contemplated uses of land" will be upheld as long as it is "reasonably necessary to the effectuation of a substantial public purpose" and does not have "an unduly harsh impact upon the owner's use of the property." *Penn Central,* 438 U.S. at 125-27. Unlike cases involving zoning or the denial of a development application, in this case the commission did not impose a restriction on the Nollans' use of their property. The commission acted to acquire a public right-of-way. The Nollans do not dispute the extensive power of the commission to impose restrictions on *their use* of the beach area of their property to ensure clear views up and down the beach and an attractive, open shore area. They ask only to draw the line at the point where strangers will enter upon and make use of their property. The commission readily admits that this case "is not a situation where the property owner has been denied a permit or denied the use of property." Brief for Appellee at 33. Therefore, the facts of this case do not raise the issue of whether a regulation of permitted uses has gone too far in restricting reasonable economic use.

D. The Nollans Had Investment Backed Expectations in the Privacy of the Residence

Governmental action "may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central,* 438 U.S. at 127. For the Nollans, the

investment in their residence is substantial and an obvious purpose for the investment in a private residence is to exclude the general public. The commission suggests that knowledge of its intention to take the right-of-way robbed the Nollans of any reasonable basis to believe they could exclude the public. Brief for Appellee at 30, 34. This Court has held, however, that when the property right is recognized under state law, knowledge of the government's intention to confiscate property does not defeat the expectation required to support a "taking" claim, even when a statutory provision authorizes the state's action. *Webb's Fabulous Pharmacies,* 449 U.S. at 161. In *Loretto, supra,* this Court found a "taking" to have occurred even though Loretto purchased the property after the cable equipment had already been installed. 458 U.S. at 421-22.

E. The Commission Imposed the Permit Condition with the Intent of Taking Property from the Nollans for Public Use

"Finally, government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.'" *Penn Central,* 438 U.S. at 128. The Nollans have been snared in a well-established, comprehensive program of the commission to create an elaborate network of *new* rights-of-way to expand and improve access to beach areas for the general public. The commission has vigorously pursued this purpose, establishing by way of its Public Access (Shoreline) Interpretative Guidelines (JA 349-483) a programmatic objective to exact rights-of-way from all manner of new development except projects expressly exempted by the Legislature. JA 359-60. On Faria Beach where the Nollans' property is located the commission had established a specific local "comprehensive program to provide continuous public access along Faria Beach." JA 68. The commission's "findings" emphasize the "comprehensive program" for obtaining access and focus on preexisting facts not related to the Nollans' actions. JA 68. The discussion at the time of

the final vote focused *only* on the need to carry forward with the commission's previously established objectives to establish "fluid access" up and down the coast and the concern of the commission that it not lose "a chunk of an access that we had counted on . . . for continuity." JA 326.

The simple fact of this case is that the commission had acquisition on its mind. It is creating a public road along the beach. The Nollans' loss of property is not a "by-product of governmental decision making." It is a "result from a deliberate decision to appropriate certain property for public use." *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City,* 473 U.S. —, 105 S. Ct. 3108, 3126 (1985) (Stevens, J., concurring). The commission's action "has not merely 'adjust[ed] the benefits and burdens of economic life to promote the common good.' Rather, the exaction is a forced contribution to [a] general governmental [program to acquire coastal property]." *Webb's Fabulous Pharmacies,* 449 U.S. at 163 (citation omitted).

F. No Special Reason Exists To Burden the Nollans with the Full Cost of Establishing Public Use of Their Beach Property

Recognizing that the Nollans have caused no actual effect on public access, the commission attempts to justify its demand for the right-of-way by suggesting that the Nollans have caused "overcrowding of existing facilities and loss of open space" and "deprivation of visual access." Brief for Appellee at 32. There are, however, no *facts* in the record to show that the new home cuts off views of the beach which existed around or over the structure which previously existed on the lot. The only facts in the record are to the contrary that no views existed with the previous development. JA 301, 311-12, 396. At Faria Beach a low, one-story house blocks all view of the beach and the ocean. JA 267. The commission bases its claim not on facts but on an erroneous assumption that since the house is larger it must block the view. JA 57-58, 65. Likewise, there are no facts to show that the replacement home will contribute to

new development pressures. The facts are to the contrary. There is no increase in the number of residential units and the intended occupancy of the unit is reduced. JA 17, 21, 59, 301, 315. The commission's claim again is not supported by facts, only by its surmise that someone else might at some future time use the house to accommodate "a larger family." JA 60. Even the commission concluded that since the Nollans' project would reduce intended occupancy from eight to four "a reduction in use would occur if occupancy were to be permanently limited to four individuals." *Id.* On the facts of this case, the one for one replacement of a single residential unit has had no effect on available public access to the beach, has had no effect on views of the beach area, and has caused no crowding of public facilities or areas.

The commission attempts to rely upon the rubric of "cumulative impacts" as a substitute for facts in the record demonstrating actual effects. Brief for Appellee at 17-18, 22. However, there can be no "cumulative effect" in the absence of "incremental effects of *an individual project.*" Cal. Pub. Res. Code § 30105.5 (West's 1986) (emphasis added). *Wickard v. Filburn,* 317 U.S. 111 (1942), does not support the contention that no actual effects from the Nollans' project are required in a "taking" analysis. In that case, although the farmer grew a minimal amount of wheat, he did grow wheat. The findings of both the courts below are that the Nollans did not affect access. JA 38, 417, 419, 425. Moreover, this Court's discussion of cumulative effects in *Wickard v. Filburn* is directed toward the issue of whether the jurisdiction of the agency under the Agricultural Adjustment Act of 1938 and the Commerce Clause could reach the minimal activities of the wheat farmer. A just compensation claim is not discussed.

Finding no actual effects from the Nollans' project, the Court of Appeal resorted to metaphorical reasoning, stating that it is one small project among many along the

coast and, therefore, one more brick in the wall separating the people of California from the state's tidelands. JA 425. However accurate that metaphor may be in describing other areas of the California coast it is a misrepresentation of the Ventura coast where Faria Beach is located. There is no solid wall. In the first ten miles of coast north of the City of Ventura there are only two small, isolated residential tracts covering approximately one and one-half miles. The rest is public beach and open coast. JA 302. The Ventura County Beaches Study describes Faria Beach as "a small residential tract" on a section of the coast which "is not highly developed," includes a state beach and two county beach parks, and provides "an exceptionally scenic drive for the freeway traveler *with unobstructed views of the ocean.*" JA 256 (emphasis added). Beach access is not a general concept. "[It] will depend on the local situation." JA 217. The Nollans, by replacing one small house with another in a small residential tract along this open coastal area, have done nothing to detract from either the public's actual use or mental conceptions of the tidelands area.

—o—

CONCLUSION

The decision of the trial court should be reinstated. The commission argues that "the appropriate remedy would be to remand the matter to allow the condition to be deleted." Brief for Appellee at 36. Therefore, the Nollans and the commission are in agreement that the appropriate remedy would be to relieve the Nollans from the burden of the permit condition. However, a remand is neither appropriate nor necessary. The judgment of the trial court directed that the condition be removed from the permit. JA 412. Since the parties agree on the remedy "a remand at this juncture would be a costly procedure to emphasize points that have already been made and recognized by both parties." *Withrow v. Larkin,* 421 U.S. 35, 45-46 (1975). Since the Court of Appeal reversed based on inappropriate legal standards,

the decision of the Court of Appeal should be reversed and the judgment of the trial court reinstated.

DATED: March, 1987.

Respectfully submitted,

RONALD A. ZUMBRUN
*ROBERT K. BEST
*COUNSEL OF RECORD
TIMOTHY A. BITTLE
Pacific Legal Foundation
555 Capitol Mall, Suite 350
Sacramento, California 95814
Telephone: (916) 444-0154

Attorneys for Appellants

APPENDIX

PERTINENT CALIFORNIA STATUTES

1. **California Civil Code:**

§ 654. Ownership; property defined

PROPERTY WHAT. The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this Code, the thing of which there may be ownership is called property.

2. **California Public Resources Code:**

§ 30105.5. Cumulatively; cumulative effect

"Cumulatively" or "cumulative effect" means the incremental effects of an individual project shall be reviewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

§ 31106. Eminent domain

The State Public Works Board may, pursuant to Section 31105, use the power of eminent domain for the purposes specified in this division.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN, APPELLANTS

v.

CALIFORNIA COASTAL COMMISSION

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER J. MARZULLA
THOMAS E. HOOKANO
DOUGLAS W. KMIEC
Deputy Assistant Attorneys General

RICHARD J. LAZARUS
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
JOSEPH F. DIMENTO
RAYMOND B. LUDWISZEWSKI
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 633-2217

40 pp

QUESTION PRESENTED

Whether the California Coastal Commission committed an unconstitutional taking of property when it required, as a condition on a coastal development permit for replacement of an existing house with a substantially larger home, that the permittee dedicate to the public a right to pass and repass laterally along the shoreline.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	3
Summary of argument	8
Argument:	
Remand is necessary to determine whether the Coastal Commission's permit condition of a dedication of lateral access is reasonably proportional both in character and degree to the burdens on the public imposed by appellants' development	11
A. No one of the three factors identified by this Court as having particular significance to takings analysis—the character of the governmental action, its interference with reasonable investment-backed expectations, and its economic impact—is dispositive of the constitutionality of the Coastal Commission's lateral access requirement	13
1. A permit condition on development of private property that exacts a limited public easement across the property has been held not to be the equivalent of a permanent physical occupation and therefore should not be treated as a per se taking	14
2. The Coastal Commission's lateral access requirement is not immune from takings challenge on the theory that there is no interference with "reasonable investment-backed expectations" when a landowner has prior notice that a development permit will include a particular condition	16
3. The Coastal Commission's lateral access requirement may amount to an unconstitutional taking although appellants plainly are not being deprived of all "economically viable use" of their property	19

Argument—Continued: Page

B. The constitutionality of the Coastal Commission's condition on appellants' development permit turns on whether the condition is rationally related to a legitimate governmental goal *and* whether the terms of the condition are reasonably proportional both in character and degree to the burdens imposed by appellants' development 21

C. Neither court below applied the correct takings analysis and, consequently, remand is necessary for further consideration of facts relevant to disposition of appellants' takings claim 24

Conclusion 30

TABLE OF AUTHORITIES

Cases:

Agins v. *City of Tiburon*, 447 U.S. 255 .....13, 18, 20, 28
Andrus v. Allard, 444 U.S. 51 16
Ansonia Board of Education v. *Philbrook*, No. 85-495 (Nov. 17, 1986) 30
Ansuini v. *City of Cranston*, 107 R.I. 63, 264 A.2d 910 25
Armstrong v. *United States*, 364 U.S. 40 ..... 11, 20
Board of Supervisor's v. *Rowe*, 216 Va. 128, 216 S.E.2d 199 27
Bowen v. *Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986) 17
Central Hardware Co. v. *NLRB*, 407 U.S. 539..... 15
City of Berkeley v. *Superior Court*, 26 Cal.3d 515, 606 P.2d 362, 162 Cal. Rptr. 327 3
City of College Station v. *Turtle Rock Corp.*, 680 S.W.2d 802 ..... 24, 25
City of Los Angeles v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986) 30
Cleveland Board of Education v. *Loudermill*, 470 U.S. 532 18
Collis v. *City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 .....25, 26, 27

Cases—Continued: Page

Commonwealth Edison Co. v. *Montana*, 453 U.S. 609 23
Connolly v. *Pension Benefit Guaranty Corp.*, No. 84-1555 (Feb. 26, 1986) 11, 12, 14, 16-17, 19, 23, 25
Frost & Frost Trucking Co. v. *Railroad Comm'n*, 271 U.S. 583 ..... 19, 22
Griggs v. *Allegheny County*, 369 U.S. 84 14
Hawaii Housing Authority v. *Midkiff*, 467 U.S. 229 18
Hodel v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 ..... 13, 25
Hollywood, Inc. v. *Broward County*, 431 So.2d 606.. 25
Home Builders Ass'n v. *City of Kansas City*, 555 S.W.2d 832 24
Howard County v. *JJM, Inc.*, 301 Md. 256, 482 A.2d 908 23
Jenad v. *Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 24
Kaiser Aetna v. *United States*, 444 U.S. 164 .....11, 12, 14, 15, 26
Kirby Forest Industries, Inc. v. *United States*, 467 U.S. 1 11
Land/Vest Properties, Inc. v. *Town of Plainfield*, 117 N.H. 817, 379 A.2d 200 24
Longridge Builders, Inc. v. *Planning Board*, 52 N.J. 348, 245 A.2d 336 24
Loretto v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 .....13, 14, 15, 16, 18, 26
MacDonald, Sommer & Frates v. *Yolo County*, No. 84-2015 (June 25, 1986) 12
Members of the City Council v. *Taxpayers for Vincent*, 466 U.S. 789 22
Minnesota v. *Clover Leaf Creamery Co.*, 449 U.S. 456 18
Monongahela Navigation Co. v. *United States*, 148 U.S. 312 22
Nashville, C. & St. L. Ry. v. *Walters*, 294 U.S. 414.. 23, 26
NLRB v. *Babcock & Wilcock Co.*, 351 U.S. 105..... 23
Oliver v. *United States*, 466 U.S. 170 ..... 27, 29

Cases—Continued: Page

Pacific Legal Foundation v. *California Coastal Commission*, 33 Cal.3d 158, 655 P.2d 306, 188 Cal. Rptr. 104 26
Pacific States Box & Basket Co. v. *White*, 296 U.S. 176 18
Payton v. *New York*, 445 U.S. 573 27
Penn Central Transportation Co. v. *New York City*, 438 U.S. 104 ..... 11, 13, 14, 18, 20, 22, 28
Pennsylvania Coal v. *Mahon*, 260 U.S. 393 ..... 23, 28
PruneYard Shopping Center v. *Robins*, 447 U.S. 74 ..... 11, 12, 27, 29
Pumpelly v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166 23
Railway Express v. *New York*, 336 U.S. 106 27
Ruckelshaus v. *Monsanto Co.*, 467 U.S. 986 ..... 11, 13, 17, 18, 19, 26, 29
Sanks v. *Georgia*, 401 U.S. 144 12
Sporhase v. *Nebraska*, 458 U.S. 941 22
Stephenson v. *Binford*, 287 U.S. 251 ..... 22, 23, 25
St. Louis v. *Western Union Telegraph Co.*, 148 U.S. 92 15
United States v. *Causby*, 328 U.S. 256 14
United States v. *Eureka Mining Company*, 357 U.S. 155 26
United States v. *Security Industrial Bank*, 459 U.S. 70 18
Webb's Fabulous Pharmacies, Inc. v. *Beckwith*, 449 U.S. 155 ..... 16, 18, 29
Williams v. *Georgia*, 349 U.S. 375 12

Constitution, statutes and regulations:

U.S. Const.:
Amend. IV 29
Amend. V (Takings Clause) 9, 10, 18, 22, 23, 24, 26, 27, 28
Cal. Const. Art. X, § 4 28
Clean Water Act § 404, 33 U.S.C. 1344 2
Coastal Zone Management Act of 1972, 16 U.S.C. 1451 *et seq.*:
16 U.S.C. 1452(2)(D) 18
16 U.S.C. 1454(a)(1) 1

Constitution, statutes and regulations—Continued: Page

16 U.S.C. 1454(b)(7) 2, 18
16 U.S.C. 1454(h)(2) 2
16 U.S.C. 1455(a) 2
16 U.S.C. 1455(d)(2) 2
16 U.S.C. 1455a(a)(1)(B) 2
16 U.S.C. 1458 2
Endangered Species Act, 16 U.S.C. 1539(a) 2
Cal. Civ. Proc. Code Ann. § 1094.5(g) (West 1980) 7
Cal. Pub. Res. Code (West 1986):
§ 30212 6
§ 30212(a) 4
§ 30212(b)(2) 5, 25
33 C.F.R.:
Section 320.4(e) 3
Section 320.4(g)(2) 3
Section 325.4(a) 2, 3
36 C.F.R. 212.9(b) 3

Miscellaneous:

ALI, *Model Land Development Code* (1976) 22
Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U.L. Rev. 465 (1983) 23
Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs On New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119 (1964) 21
Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1164 (1967) 14
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986) 12

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-133

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN, APPELLANTS

v.

CALIFORNIA COASTAL COMMISSION

ON APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING REVERSAL

INTEREST OF THE UNITED STATES

This case concerns the constitutionality of a state coastal zone management practice of conditioning the issuance of certain development permits upon the permit applicant's acceptance of a deed restriction allowing the public to pass and repass across the property along the shoreline. State coastal zone management is of substantial interest to the federal government. Pursuant to the Coastal Zone Management Act of 1972, as amended, 16 U.S.C. 1451 *et seq.*, the Secretary of Commerce has provided financial assistance to coastal states to promote "the development of a [state] management program for the land and water resources of [the] coastal zone" (16 U.S.C. 1454(a)(1)). These plans must include, inter alia, "a planning process for the protection of, and access to, public beaches and other public coastal areas of environmental, recreational,

historical, esthetic, ecological, or cultural value" (16 U.S.C. 1454(b)(7)). The Secretary of Commerce reviewed and approved the California Coastal Zone Management Plan at issue in this case and has since conducted several reviews (in 1979, 1980, 1982, and 1985) of the program's implementation, including the public access provisions.[1] Hence, the constitutionality of the state program, particularly its effort to obtain public access over private property without formal condemnation, is of substantial programmatic interest to the United States.

More broadly, the United States administers a number of federal statutes that sometimes further their regulatory objectives by imposing conditions on the permit applicant's use of its property. See, *e.g.*, Endangered Species Act, 16 U.S.C. 1539(a) (Secretary of the Interior may permit, under such terms and conditions as he shall prescribe, certain acts prohibited by the Act by requiring acts necessary to mitigate the impacts of the activity or to establish and maintain the affected species); 33 C.F.R. 325.4(a) (Army Corps of Engineers may impose permit conditions on Section 404 permits (Clean Water Act, 33 U.S.C. 1344) "directly related to the impacts of the proposal, appropriate to the scope and degree of those

[1] A coastal state that has completed the development of its management program may submit its program to the Secretary for his review and approval and, if the program is approved, the state may be eligible for federal grants to defray up to 80 percent of the cost of administering the program and may be eligible for additional grants if the Secretary subsequently determines that the coastal state is making satisfactory progress in achieving the federal Act's objectives (see 16 U.S.C. 1454(h)(2), 1455(a), 1455a(a)(1)(B), 1458). One requirement for approval is that the Secretary must find that the state has power "to acquire fee simple and less than fee simple interests in land, waters, and other property through condemnation or other means when necessary to achieve conformance with the management program" (16 U.S.C. 1455(d)(2)). Although the Secretary of Commerce has approved the state program at issue in this case and continues to review its implementation, the scope of the Secretary's review does not, of course, extend to the constitutionality of the state program's application to individual landowners.

impacts, and reasonably enforceable."). Such permit conditions may even include dedications of public access. See 33 C.F.R. 320.4(e) and (g)(2), 325.4(a) (Corps of Engineer permitting authority extends to safeguarding public access to navigable waters); 36 C.F.R. 212.9(b) (Forest Service may obtain easements for trails over non-federal lands "by purchase, condemnation, donation, or as a reciprocal for permits"). The Court's consideration of the legal issues raised in this case, therefore, may potentially affect the scope of the federal government's regulatory authority in a number of federal programs.

STATEMENT

1. On March 1, 1982, appellants filed an application with appellee, the California Coastal Commission, for a coastal development permit to demolish an existing 521 square foot, one story, one bedroom, summer residence on a beach front lot and to construct in its place a 1,674 square foot, two-story, three bedroom, permanent residence, with attached two car garage (J.S. App. A2-A3; see J.A. 3-14). At the time, appellants were lessees of the property and possessed an option to purchase that was conditioned on their either rehabilitating the existing dwelling (which was in disrepair) or replacing it with a new structure (J.A. 36, 47-48). A concrete seawall, which is approximately eight feet tall and ten feet from the current mean high tide line, separates the beach portion of the property from the house and its immediate surrounding area (*id.* at 61). The parties dispute the size of the lot, presumably due to uncertainty in locating the historic mean high tide line, which is the seaward boundary of the lot under California law. See *City of Berkeley* v. *Superior Court*, 26 Cal.3d 515, 518 n.1, 521, 606 P.2d 362, 363 n.1, 364, 162 Cal. Rptr. 327, 328 n.1, 329 (1980). The Coastal Commission states that appellants' lot is 2800 square feet (see J.S. App. E21), while appellants state that the lot is 3800 square feet (see J.S. 4; J.A. 397). The lot is one of 138 similar residential lots along a tract of the beach, which had been owned by one family until recently when the family decided to provide its lessees, including appel-

lants, an option to purchase the lot within prescribed time periods (J.A. 47-48).

On April 7, 1982, the Executive Director of the Coastal Commission issued his determination that appellants should be granted a development permit with the condition that appellants must first record "a deed restriction acknowledging the right of the public to pass and repass across the * * * property in an area bounded by the mean high tide line at one end, to the toe of the revetment at the other end" (J.A. 34).[2] The Executive Director's determination that such lateral public access along the shoreline is required was based on findings by a regional office of the Commission that the proposed development would burden the public's ability to gain access along the shoreline by "discouraging the public from visiting the shoreline," "congesting existing access roads and recreational areas," and "increasing the use of the beach by residents and guests," and because adequate access did not already exist nearby (*id.* at 18-23).

The Executive Director was acting pursuant to the Coastal Commission's authority under the California Coastal Act of 1976, which states that "public access" along the coast must be a condition of permitting "new development" along the coastal zone, unless one of several circumstances is present, including "adequate access exist-[ing] nearby" (Cal. Pub. Res. Code § 30212(a) (West 1986) (J.S. App. E54)). The Coastal Act provides that "new development" does not include "[t]he demolition

[2] "Pass and repass" access provides the public with only the right to walk and run along the beach and appears to be the least onerous of public access conditions exacted by the Coastal Commission in granting development permits under the Coastal Act (J.A. 370). In other contexts the Commission sometimes requires that the permit applicant allow "passive recreation uses" or "active recreation uses" (*id.* at 370-371). The Commission's guidelines provide "that because the 'pass and repass' condition severely limits the public's ability to enjoy the adjacent state-owned tidelands * * *, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner" (*id.* at 370).

and reconstruction of a single family residence; provided that the reconstructed residence shall not exceed either the floor area, height or bulk of the former structure by more than 10 percent, and that the reconstructed residence shall be sited in the same location on the affected property" (Cal. Pub. Res. Code § 30212(b)(2) (West 1986) (J.S. App. E54)). Appellants formally objected to the Executive Director's determination and requested a full hearing before the Coastal Commission (J.A. 14-23). The Commission denied the hearing request (*id.* at 27-30).

2. Appellants subsequently filed in state superior court a petition for a writ of administrative mandamus, which the superior court granted, ordering the Coastal Commission to hold a full public hearing on appellants' permit application (J.A. 36-39). The court concluded that the Commission could not impose the lateral access condition in the absence of a showing that appellants' proposed residential development would have an individual or cumulative adverse impact on public access to the sea (*id.* at 38-39). The court discounted the relevance to the case of the Commission's evidence regarding the cumulative impact of residential construction on vacant lots and found that the current record did not support the Commission's decision (*ibid.*).

3. On remand, the Coastal Commission made further factual findings and held a public hearing at which appellants argued that the new structure would not affect the public's visual access to the beach, which they contended was already blocked by the existing dwelling, and that adequate access existed nearby (J.S. App. E21-E53; J.A. 41-73, 292-327). The Commission, however, reinstated its prior determination that a lateral access condition was appropriate (*ibid.*), noting that the Commission had similarly conditioned 43 out of 60 coastal development permits along the tract and that the condition was consistent with the public's historical use of the property (J.A. 47-48, 50).[3]

[3] Of the 17 permits not similarly conditioned, 14 permits were approved at a time when the Commission did not have administra-

The Commission further found that the proposed development constituted a "new development," within the meaning of Section 30212 of the California Public Resources Code because it would increase the size of the existing residence by more than 10 percent and would generate a cumulative burden on public access opportunities (J.A. 56-57). In particular, the Commission found "that the [appellants'] proposed development would present an increase in view blockage, an increase in private use of the shorefront, and that this impact would burden the public's ability to traverse to and along the shorefront" (*id.* at 65-66). The Commission determined that the proposed structure would be both higher and substantially wider than the existing dwelling and, consequently, would contribute to the development of "a 'wall' of residential structures" that would prevent the public "psychologically" "from realizing a stretch of coastline exists nearby that they have every right to visit" (*id.* at 56-58). The Commission also noted that the development would increase the intensity of private use of the lot while inducing growth in the area, and thereby possibly exacerbate conflict between the public and private property owners concerning the precise boundary line separating their respective rights along the shore (*id.* at 60-62).[4] The Commission rejected appellants' contention that the availability of vertical access in the general vicinity or of lateral access on either side of appellants' lot constituted "adequate access nearby," within the

---

tive regulations in place that allowed imposition of the condition, and the remaining 3 permits did not involve shorefront lots (J.A. 48).

[4] Included in the Commission's determination was a discussion of a state senior land agent's preliminary conclusion that most if not all of the property seaward of the seawall belonged to the public either by virtue of the location of the historic mean high tide line or due to the public's historical use of the beach for passive recreational use (J.A. 69-70; see *id.* at 85-86). The Commission made no finding with respect to ownership of the beach and the permit expressly reserved the state's right to assert any proprietary rights it might have (*id.* at 35).

meaning of the statutory exception to the public access requirement (*id.* at 66-68). The Commission concluded that neither is an adequate substitute (*ibid.*; see *id.* at 380-381).

4. Appellants filed a supplemental petition for a writ of administrative mandamus with the state superior court (J.A. 328-348), which again ruled in their favor (*id.* at 412-420). The court held that the evidence relied upon by the Commission—including "books and articles about access problems in other states, the impact in general of new subdivision building in previously undeveloped areas, a draft land use plan for Santa Monica, mimeographed form declarations from some surfers, and studies of shoreline conditions at Lake Tahoe" (*id.* at 416-417)—was "either not specific to the [appellants'] property or too speculative in nature to support a finding that this project * * * will create a direct or cumulative burden on public access to the sea" (*id.* at 417). The court also rejected the Commission's conclusion that the access condition was required because the project would amount to more than a 10 percent increase in size: "[A] 10 percent enlargement of [appellants'] tiny house would barely be enough to add a good-sized closet to their old floorplan * * *. A test for the imposition of access requirements which automatically required a dedication of access for any reconstruction exceeding 10% of the former structure would be unreasonably harsh" (*id.* at 418). Finally, the court rejected the Commission's determination that there was not "adequate access" nearby and directed the Commission to issue the permit without the lateral access condition (*id.* at 419-420).

The Coastal Commission did not grant the permit, but instead appealed the trial court's adverse decision.[5] While that appeal was pending, appellants exercised their option to purchase the property, and subsequently demol-

---

[5] Under California law, the Commission's appeal appears to have had the effect of automatically staying the district court's order (see Cal. Civ. Proc. Code Ann. § 1094.5(g) (West 1980)).

ished the existing dwelling and constructed the new larger residence (J.S. 5 n.1). Apparently, appellants did not first notify the Commission or seek its formal permission prior to taking these actions (see Mot. to Dis. 8-10).

5. On appeal, the court of appeal reversed (J.S. App. A1-A9; J.A. 421-427). The court first held that the trial court erred in ruling that the access condition must be supported by a finding that the proposed development would create a direct or cumulative burden on public access (J.A. 424-425). The court of appeal also held that the lateral access condition did not constitute a taking because it did not deprive appellants of the "reasonable use" of their property (*id.* at 425). The court of appeal reasoned that "only an indirect relationship between an exaction and a need to which the project contributes need exist" and the Commission had established that such an indirect relationship exists in this case because, although the proposed structure did not alone create the need for access, "it is a small project among many others which together limit public access * * * and collectively create a need" (*id.* at 424-426).[6] Finally, the court of appeal upheld the Commission's determination that "adequate access" did not otherwise exist (*id.* at 426).

SUMMARY OF ARGUMENT

1. This case concerns a takings challenge to the California Coastal Commission's determination that appellants must record a deed restriction allowing public access laterally along the shoreline in order to receive a coastal development permit. Evaluation of appellants' takings claim requires consideration of three somewhat

[6] The court of appeal, rejecting the reasoning of the trial court, held that the Commission's evidence concerning the impact of development on vacant lands was relevant because appellants' project would increase the dwelling size by more than 10 percent and, therefore, would (like development on vacant land) constitute a "new development," within the meaning of the California Public Resources Code (J.A. 425-426).

overlapping factors previously identified by this Court as having particular significance in takings analysis: the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations. In certain contexts, this Court has found that the force of just one of these factors is so overwhelming as to be dispositive of the takings inquiry. In this case, however, we believe that no one factor is determinative of appellants' takings claim. The Coastal Commission's lateral access dedication requirement is not a per se taking simply because it implicates a physical invasion of appellants' property. On the other hand, the Commission's permit condition does not escape meaningful takings scrutiny simply because appellants had notice of the condition prior to their purchase of the property or because the permit condition does not deprive appellants of any economically viable use of their property. In our view, a more structured and determinate inquiry is both possible and appropriate.

2. In particular, we believe that the Fifth Amendment limits the power to condition in two respects. First, the permit condition must advance the same legitimate governmental purpose furthered by the restriction the permit excuses. Second, the condition must be reasonably fashioned both in character and degree to address those burdens that the development of appellants' property would impose on the public health, safety, and welfare. Neither the strength of the public need for lateral access nor a showing of a rational relationship between the permit condition and some legitimate public purpose is sufficient to defeat appellants' takings claim. If the character or degree of the burdens imposed by the permit condition on appellants is wholly out of proportion to the burdens of appellants' development on the public, the condition is unconstitutional.

3. Neither the court of appeal nor the superior court applied the correct legal analysis and, as a result, remand is necessary so that those courts may, in the first instance, undertake the thorough factual inquiry essential

to proper disposition of appellants' takings claim. In particular, the court of appeal erred in not recognizing the significance to takings analysis of the permit condition's denial of the basic right of a private landowner to exclude the public from his property. The court of appeal also erred in inquiring only whether the permit exaction bore *some* threshold relationship to the burdens imposed on the public by appellants' home expansion. It failed to consider whether, as required by the Fifth Amendment, the public access exaction was sufficiently related both in *character* and in *degree* to the burdens on public access and use resulting from appellants' development. For these reasons, we share appellants' view that the judgment below, ordering the district court to deny appellants' petition for writ of mandate, should be reversed.

We cannot conclude, however, on the basis of the current record, that the Coastal Commission's permit condition of lateral access amounts to an unconstitutional taking. Although the public access provisions of the California Coastal Act of 1976, especially as construed by the Commission's interpretive guidelines, may suggest a readiness on the part of the Commission to apply the provisions in an unconstitutional manner in a particular case, the superior court failed to justify its conclusion that such an unconstitutional application occurred here. The superior court omitted to undertake certain factual and legal inquiries essential to proper resolution of appellants' takings claim, including an inquiry into the possibility of substantially diminished private property expectations in the peculiar property covered by the permit condition. For this reason, we believe that the case should be remanded to the superior court for further inquiry and for application of takings analysis consistent with the decisions of this Court.

ARGUMENT

REMAND IS NECESSARY TO DETERMINE WHETHER THE COASTAL COMMISSION'S PERMIT CONDITION OF A DEDICATION OF LATERAL ACCESS IS REASONABLY PROPORTIONAL BOTH IN CHARACTER AND DEGREE TO THE BURDENS ON THE PUBLIC IMPOSED BY APPELLANTS' DEVELOPMENT

In recent years, this Court—at least in respect to impositions that depart from the paradigm of a permanent physical occupation—has repeatedly "eschewed the development of any set formula for identifying a 'taking' forbidden by the Fifth Amendment, and ha[s] relied instead on ad hoc, factual inquiries into the circumstances of each particular case." *Connolly* v. *Pension Benefit Guaranty Corp.* No. 84-1555 (Feb. 26, 1986), slip op. 12-13; see, *e.g.*, *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1005 (1984); *Kaiser Aetna* v. *United States*, 444 U.S. 164, 175 (1979); *Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 124 (1978). The focus of the judicial inquiry in each case is "whether the restriction on private property 'forc[es] some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *PruneYard Shopping Center* v. *Robins*, 447 U.S. 74, 83 (1980), quoting *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960). "[W]hile most burdens consequent upon governmental action undertaken in the public interest must be borne by individual landowners as concomitants of the 'the advantage of living and doing business in a civilized community,' some are so substantial and unforeseeable, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." *Kirby Forest Industries, Inc.* v. *United States*, 467 U.S. 1, 14 (1984) (citations and footnotes omitted).

To aid the takings analysis, the Court has identified three somewhat overlapping factors that have particular significance: "the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations" (*PruneYard Shopping Center* v. *Robins*, 447 U.S. at 83; see *MacDonald, Sommer & Frates* v. *Yolo County*, No. 84-2015 (June 25, 1986), slip op. 8; *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 13; *Kaiser Aetna* v. *United States*, 444 U.S. at 175). Based on our assessment of the three factors as applied to the circumstances of this case, we agree with appellants that the state court of appeal did not correctly apply this Court's takings decisions in rejecting appellants' takings claim.[7] Because, however, the superior court rejected the Coastal Commission's defense to appellants' claim without fully considering several factual and legal matters raised by the record that we believe would be best addressed by a state trial court in the first instance, we believe the case should be remanded for such further proceedings.

---

[7] The Coastal Commission contends in a second motion to dismiss (Mot. to Dis. 8-11), which this Court denied on December 15, 1986, that it learned for the first time from appellants' jurisdictional statement that appellants had built their replacement dwelling without a permit while the case was pending on appeal, and that under California law such unilateral action amounts to a waiver of appellants' right to challenge the constitutionality of the permit condition. It is settled beyond dispute that a litigant must follow state procedures in raising a federal constitutional claim in state court and that, unless those state procedures are unreasonable, failure to do so may deprive this Court of jurisdiction to review the constitutional claim. See *Williams* v. *Georgia*, 349 U.S. 375, 382-385 (1955); see generally R. Stern, E. Gressman, & S. Shapiro, *Supreme Court Practice* 149-155 (6th ed. 1986). It is less clear whether the Commission has not waived this independent state ground and may raise it for the first time before this Court. Where, however, "[t]he focus of [a] lawsuit has been completely blurred if not altogether obliterated [by subsequent events], and [the Court's judgment] on the important issues involved is potentially immaterial," remand may be appropriate. *Sanks* v. *Georgia*, 401 U.S. 144, 152 (1971).

A. No One of the Three Factors Identified by this Court as Having Particular Significance to Takings Analysis —the Character of the Governmental Action, its Interference with Reasonable Investment-Backed Expectations, and its Economic Impact—Is Dispositive of the Constitutionality of the Coastal Commission's Lateral Access Requirement

In some circumstances, this Court has found the force of just one of the three factors previously identified as being of particular significance to taking analysis—the character of the governmental action, its economic impact, and its interference with reasonable investment-backed expectations—to be so overwhelming as to be dispositive of the takings inquiry. In *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982), the Court held that the "character of the governmental action"—there, "a permanent physical occupation" of private property by a sovereign—was enough to justify a finding that an unconstitutional taking had occurred. In *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1005, the Court held that consideration of the government's "interference with reasonable investment-backed expectations" was sufficient to dispose of a takings challenge. Looking solely to that factor, the Court in *Monsanto* concluded that application of a government regulation to certain activities constituted an unconstitutional taking, while its application to other activities plainly did not (*id.* at 1005-1016). Finally, where the takings challenge is to a classic exercise of the police power, such as traditional zoning restrictions, in which the government is simply "adjusting the benefits and burdens of economic life to promote the common good,"[8] the Court has typically focused solely on the "economic impact" of the law, inquiring whether the challenged law "denies an owner economically viable use of his land." See *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 296 (1981); *Agins* v. *City of Tiburon*, 447 U.S. 255,

---

[8] *Penn Central Transp. Co.* v. *New York City*, 438 U.S. at 124.

260 (1980). We believe, however, that in this case, as in *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 12-15 and in *Kaiser Aetna* v. *United States*, 444 U.S. at 178-180, no one of the three factors identified by this Court is dispositive of the takings issue.

1. A Permit Condition on Development of Private Property that Exacts a Limited Public Easement Across the Property Has Been Held Not to Be the Equivalent of a Permanent Physical Occupation and Therefore Should Not Be Treated as a Per Se Taking

It is well settled that "[a] 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government" (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. at 124). See, *e.g.*, *Griggs* v. *Allegheny County*, 369 U.S. 84, 88-90 (1962); *United States* v. *Causby*, 328 U.S. 256, 265-266 (1946); see also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1185 (1967). Indeed, in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. at 432, this Court embraced a virtual per se "rule that a permanent physical occupation is a government action of such a unique character that it is a taking without regard to other factors that a court might ordinarily examine." *Loretto* involved the placement, pursuant to a state statute, of a transmission cable on the roof of an apartment building, which the Court held to be a Fifth Amendment taking, notwithstanding the minimal economic impact of the intrusion on the building's owner.

While *Loretto*'s teachings concerning the significance of physical invasions carry substantial relevance for this case, its per se rule is not dispositive of appellants' claim. Unlike the cable placement in *Loretto*, the Coastal Commission lateral access dedication requirements do not qualify as "permanent" in nature or as a physical "occupation" of private property, since the public obtains only a right to "pass and repass" and not a right to occupy

permanently appellants' beach or even to engage in passive recreational activities on the beach (see J.A. 34, 369-371).[9]

In *Loretto*, the Court emphasized that such a " 'temporary and shifting' " use is not the equivalent, for the purposes of takings analysis, of a "permanent" physical occupation (458 U.S. at 428-429, quoting *St. Louis* v. *Western Union Telegraph Co.*, 148 U.S. 92, 98-99 (1893)). Cf. *Central Hardware Co.* v. *NLRB*, 407 U.S. 539, 545 (1972) (upholding requirement that employer allow union organizers access to plant because the "the 'yielding' of property rights it may require is both temporary and minimal"). Similarly, in *Kaiser Aetna*, which involved an effort by the Army Corps of Engineers to require public access to a private marina, the Court did not treat that "easement of passage" as an "occupation" automatically requiring compensation. See *Loretto*, 458 U.S. at 433. Instead, the Court characterized the governmental action as a physical "invasion" and concluded that it constituted an unconstitutional taking only after engaging in a multifactor takings analysis (see 444 U.S. at 178-179).

This case also differs from *Loretto* in that it involves a permit condition allegedly necessary to alleviate burdens resulting from appellants' proposed residential development, rather than a limitation or condition unilaterally imposed by the government. In order to assess the constitutionality of such a permit condition, one must consider whether the effects of developing the land in the proposed manner are so adverse as to justify the government's imposition of a condition as intrusive as a physical invasion, and whether the government imposition bears

---

[9] The terms "permanent" and "occupation" have acquired a technical meaning in some of this Court's takings cases. The invasion here, of course, is permanent in the sense that the easement it exacts is not limited in time, and the intrusion—passing and repassing—is entirely physical and in that sense an occupation (though intermittent) as opposed to a regulatory limitation.

an appropriate relation to the development's impact on others. Such impositions on property owners are not immune from takings analysis on the mistaken theory that they are "voluntarily" assumed as a condition of development (see pages 18-19, *infra*). The physically invasive character of the condition in this case renders substantially more burdensome the government's task of justification. Resolution of the takings claim, however, cannot be disposed of by a simple per se rule based on the character of the governmental action.[10]

2. The Coastal Commission's Lateral Access Requirement Is Not Immune From Takings Challenge On the Theory That There Is No Interference with "Reasonable Investment-Backed Expectations" When a Landowner Has Prior Notice That a Development Permit Will Include a Particular Condition

Appellants' taking claim also cannot be *defeated* by reference to the single factor that there was no interference with "reasonable investment-backed expectations" since appellants had notice of the Coastal Commission's condition prior to their voluntary purchase of the property. To be sure, "[t]he timing of acquisition of [property] is relevant to a takings analysis of [the owner's] investment-backed expectation" (*Andrus* v. *Allard*, 444 U.S. 51, 64-65 (1979)) and prior notice weighs against the finding of a taking. See *Connolly* v. *Pension Benefit*

[10] The Coastal Commission's argument is distinct from New York City's argument in *Loretto*, squarely rejected by this Court, that the landowner could simply avoid application of the statute by ceasing to rent apartments to tenants. See 458 U.S. at 439 n.17 ("a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical invasion"). In *Loretto*, the City made no suggestion that a burden imposed by the activity being regulated somehow justified the physical occupation requirement. Cf. *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 163-164 (1980) ("No police power justification is offered for the deprivation. * * * The county's appropriation of the beneficial use of the [property] is analogous to the appropriation of the use of private property in [*Causby*].").

Guaranty Corporation, slip op. 14-15; *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1004-1014; cf. *Bowen* v. *Agencies Opposed to Social Security Entrapment*, No. 85-521 (June 19, 1986), slip op. 13-14. Indeed, in *Monsanto*, this Court rejected, on that basis alone, a takings challenge to a federal statute that authorized federal agency disclosure of trade secret information submitted to the agency in order to register a pesticide for sale in interstate or foreign commerce. The Court held that "as long as [the company] is aware of the conditions under which the [trade secret] data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking" (467 U.S. at 1007).[11]

Monsanto, however, does not compel rejection of appellants' taking claim in this case. To be sure, in this case, as in *Monsanto*, appellants clearly were "aware" of the permit condition—that they convey a limited easement over a portion of their property to the public—the legality of which they contest.[12] In addition, there is no dispute that the permit condition in this case is, as in *Monsanto*, "rationally related to a legitimate Government interest" (467 U.S. at 1007).[13] This Court in *Monsanto*,

[11] Because the Court found that Monsanto did not have sufficient notice prior to its submissions made between October 22, 1972, and September 30, 1978 (and, indeed had received explicit statutory guarantees to the contrary with respect to those submissions), the Court concluded that application of the federal statutory requirement to those submissions would amount to an unconstitutional taking in the absence of "just compensation." See 467 U.S. at 1010-1013.

[12] Indeed, appellants did not formally own the property when they applied for the development permit and or when they received the Coastal Commission's decision. Presumably, therefore, the price paid by appellants for the property may have reflected any losses caused by the Commission's effort to impose a lateral access condition on development.

[13] Congress has itself recognized the importance of providing and protecting public access to and along the coastal zone. See 16 U.S.C.

however, did not intend to disturb the well settled notion that the mere showing of a rational relationship between a governmental measure and a legitimate governmental objective does not end the takings inquiry.[14] Nor does *Monsanto* stand for the proposition that government may always avoid any takings scrutiny simply by providing a landowner with prior notice of a permit condition or other restriction.[15] The features that distinguish this case from *Monsanto* and require the application of a broader assessment of appellants' takings claim than that necessary in *Monsanto* are the Court's assumptions in *Monsanto* that the elements of voluntariness and reason-

---

1452(2)(D), 1454(b)(7). This Court, moreover, has often warned against judicial second-guessing of legislative determinations of what constitutes a legitimate governmental interest (see, *e.g.*, *Monsanto*, 467 U.S. at 1014; cf. *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229, 240 (1984)) or of whether a specific police power measure is "rationally related" to a particular objective (see, *e.g.*, *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 461-470 (1981); *Pacific States Box & Basket Co.* v. *White*, 296 U.S. 176, 186 (1935)).

[14] "[H]owever 'rational' the exercise of [governmental] power may be, that inquiry is quite separate from the question whether the enactment takes property within the prohibition of the Fifth Amendment." *United States* v. *Security Industrial Bank*, 459 U.S. 70, 75 (1982); *Loretto*, 458 U.S. at 425 ("It is a separate question, however, whether an otherwise valid regulation so frustrates property rights that compensation must be paid."); *Agins* v. *City of Tiburon*, 447 U.S. at 260 ("taking if the [enactment] does not substantially advance legitimate state interests *or* denies an owner economically viable use of his land") (emphasis added and citations omitted); see also *Penn Central*, 438 U.S. at 127.

[15] "Were the rule otherwise, the [Fifth Amendment] would be reduced to a mere tautology." Cf. *Cleveland Board of Education* v. *Loudermill*, 470 U.S. 532, 539, 541 (1985) (rejecting contention that state may avoid procedural due process scrutiny when "the property right is defined by, and conditioned on, the legislature's choice of procedures for its deprivation"). As this Court emphasized in *Webb's Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. 155, 164 (1980), "a State, by *ipse dixit*, may not transform private property into public property without compensation, even [in a limited respect]. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent."

ableness had been satisfied,[16] while in this case these are precisely the elements at the core of the controversy. In addition, the legislation challenged in *Monsanto* concerned pesticide regulation and, therefore, unlike this case, implicated public health and safety—an area in which judicial deference to legislative action is traditionally great (see page 21 & note 19, *infra*).

In this case, appellants have from the outset sharply disputed the reasonableness of the burdens imposed by the condition, claiming that the "condition bears no reasonable relationship to any asserted burden created by the proposed home" (J.A. 343). Their request, moreover, for a development permit may be "in form voluntary," but it may "in fact lack[] none of the elements of compulsion." See *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 593 (1926). Unless the activity they propose—to replace a single family vacation home with a larger single family permanent residence on property zoned residential—somehow justifies the particular exaction being imposed, that exaction must be viewed like a unilateral assertion of government power.

3. The Coastal Commission's Lateral Access Requirement May Amount to an Unconstitutional Taking Although Appellants Plainly Are Not Being Deprived of All "Economically Viable Use" of Their Property

Finally, it is relevant to, but not dispositive of appellants' takings claim that the Coastal Commission's con-

---

[16] In *Monsanto*, the Court assumed the "voluntary" nature of the private action that triggered the imposition of the federal statute's disclosure statute (see 467 U.S. at 1007). In addition, the Court apparently assumed the reasonableness of the burden imposed by the condition based on Monsanto's own behavior. See *ibid.* ("That Monsanto is willing to bear this burden in exchange for the ability to market pesticides into this country is evidenced by the fact that it has continued to expand its research and development and to submit data to EPA despite the enactment of the [express statutory requirement of disclosure]."); see also *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 14-15 (employers had more than sufficient notice that they were liable for their "proportionate share").

dition on development would not deprive appellants of all "economically viable use" of their property. In *Agins* v. *City of Tiburon*, 447 U.S. at 260, this Court stated that the application to particular property of a classic exercise of the police power, such as a general zoning law, effects a taking if the ordinance "denies an owner economically viable use of his land." The Coastal Commission's policy of conditioning development permits on the landowner dedicating lateral access to the public is plainly within the state's police power (see page 17 & note 13, *supra*) and it does not deprive appellants of all "economically viable use" of their land.[17]

While the failure to meet this test might render the Commission's practice an unconstitutional taking, the satisfaction of it does not necessarily end the inquiry. For the Takings Clause is intended to prevent the Government from imposing on particular individuals burdens which, "in all fairness and justice, should be borne by the public as a whole" (*Penn Central Transportation Co.* v. *New York City*, 438 U.S. 104, 123 (1978); *Armstrong* v. *United States*, 364 U.S. 40, 49 (1960)), even if the government impositions do not deprive the owner of the whole economic value of his property. The government's authority to affect property values through regulations depends not just on a legitimate public purpose, but also on general and just distribution of the burdens. Accordingly, government cannot claim absolute power to impose conditions on the mistaken theory that it is merely offering the landowner the "option" or "privilege" of a *more*

[17] The lateral access requirement is triggered only because appellants propose building a residence more than 10 percent larger than the existing dwelling. Under the literal terms of the state statute, appellants could have avoided the requirement by replacing the existing dwelling with a house less than 10 percent greater in size. The smaller house might be less desirable to appellants, but would certainly constitute an "economically viable use" of the property. Likewise the option of building a larger home, subject to the condition of lateral access for the public along the shore, would constitute a viable use of the property.

economically viable use.[18] The government's power to require such a condition without payment of compensation must turn upon a reasonable relationship, in character and degree, between the permit condition and the burdens imposed by the proposed development which triggers the permit requirement. Otherwise, the Takings Clause would not be offended by the wholly arbitrary and selective imposition of conditions that reduce value but leave economically viable uses.

B. The Constitutionality of the Coastal Commission's Condition on Appellants' Development Permit Turns on Whether the Condition is Rationally Related to A Legitimate Governmental Goal *And* Whether the Terms of the Condition Are Reasonably Proportional Both In Character and Degree to the Burdens Imposed By Appellants' Development

Assessment of all three factors identified by this Court as having particular significance to takings analysis suggests that the constitutionality of a permit condition, such as the one at issue in this case, turns on the relationship between the government's justifications for the condition and the burdens that would be imposed on the public by the activity being regulated or restricted. As a general matter, the more intrusive the condition on the landowners' property rights (either because of the character of the intrusion or its degree), the more likely it is that a taking should be found. And, conversely, the more substantial the government interests (either in character or degree) in addressing the burdens on the public that the landowner's proposed activity would cause, the more justified the government's "singling out" the landowner and the less likely that a taking should be found.[19]

[18] See generally Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs On New Suburban Residents Through Subdivision Exactions*, 73 Yale L. J. 1119, 1130 (1964).

[19] Where, for example, the governmental interest at stake is a core police power concern, such as public health and safety, the requisite relationship that the government must establish to justify a condition is less than with other government interests more

The validity of a Takings Clause objection to an exercise of the police power in conditioning a permit is not, however, a simple function of the urgency of the governmental interest and the intrusiveness of the imposition on the landowner. A more structured and determinate inquiry is both possible and appropriate. In particular, we believe that the Fifth Amendment limits the power to condition in two respects. First, the permit condition must advance the same legitimate governmental purpose furthered by the restriction that the permit excuses.[20] Second, the condition must be reasonably fashioned both in character and degree to address those burdens that the proposed use of the private property would impose on the public health, safety, or welfare.[21] These inquiries are

---

distributional in character, which, while legitimate, may be less weighty in the constitutional balance. Cf. *Sporhase* v. *Nebraska*, 458 U.S. 941, 956 (1982); *Members of the City Council* v. *Taxpayers for Vincent*, 466 U.S. 789, 821-822 & n.3 (1984) (Brennan, J., dissenting); *Penn Central Transp. Co.* v. *New York City*, 438 U.S. at 145 (Rehnquist, J., dissenting).

[20] Because the permit condition acts to lift a police power restriction, the condition must itself be rationally related to the legitimate goal advanced by the restriction. While a restriction on private activity may theoretically be justified by traditional police power concerns, the terms of a condition that would excuse compliance with the restriction may indicate that the actual purpose is unrelated to the purported police power goal. This Court described the necessary relationship in *Stephenson* v. *Binford*, 287 U.S. 251, 275 (1932), when the Court distinguished the case before the Court from an earlier case where the terms of a condition had revealed that "the [state] act * * * was in no real sense a regulation of the use of the public highways. Its purpose was to protect the business of those who were common carriers. * * * Protection or conservation of the highways was not involved." See *Frost & Frost Trucking Co.* v. *Railroad Comm'n*, 271 U.S. 583, 591 (1926).

[21] See ALI, *Model Land Development Code* § 2-103 (1976) ("[permit exactions] of a quality and quantity reasonably necessary for the proposed development"); cf. *Monongahela Navigation Co.* v. *United States*, 148 U.S. 312, 325 (1893) (emphasis added) ("[The takings clause] prevents the public from loading up on one individual more than his just share of the burdens of government, and says that when he surrenders to the public something *more and different*

required by the Fifth Amendment because when individual property owners are singled out to bear the cost of advancing the public convenience, the imposition must bear "some reasonable relation to the evils to be eradicated" (*Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. 405, 429 (1935) (footnote and citations omitted)) in order to ensure that the individual has not been asked to share more than his "proportion[ate]" burden (see *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 14; cf. *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105, 112 (1956)).[22] Neither the strength of the public need nor a strong desire to appropriate private property is enough to avoid an unconstitutional taking. See *Pennsylvania Coal* v. *Mahon*, 260 U.S. 393, 415-416 (1922) ("a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"). Nor can majoritarian principles be trusted to protect the individual property owner from legislative overreaching. See *ibid.*; see also *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall.) 166, 177 (1871). Hence, when either the character or the degree of the burdens imposed by the permit condition is "wholly out of proportion," such a burden is unconstitutional. See *Connolly*, slip op. 2 (O'Connor, J., concurring); see also *Stephenson* v. *Binford*, 287 U.S. at 275.[23]

---

from that which is exacted from other members of the public, a full and just equivalent shall be returned to him.") (emphasis added); *Commonwealth Edison Co.* v. *Montana*, 453 U.S. 609, 622 n.12 (1981) (general revenue tax need satisfy only threshold standard of reasonableness to survive Commerce Clause challenge, but user fee taxes are subject to more exacting review "[b]ecause such charges are purportedly assessed to reimburse the State for costs incurred in providing specific quantifiable services").

[22] See Costonis, *Presumptive and Per Se Takings: A Decisional Model for the Taking Issue*, 58 N.Y.U. L. Rev. 465, 488 (1983).

[23] On this basis, state courts have struck down municipal conditions on development permits in some circumstances (see, *e.g.*, *Howard County* v. *JJM, Inc.*, 301 Md. 256, 282, 482 A.2d 908, 921

C. Neither Court Below Applied the Correct Takings Analysis and, Consequently, Remand is Necessary for Further Consideration of Facts Relevant to Disposition of Appellants' Takings Claim

The courts below misapplied this Court's takings precedent and, as a result, their limited factual inquiry provides an insufficient basis for final disposition of appellants' takings claim. While the condition of allowing lateral public access is itself sufficiently related to a legitimate governmental goal as to satisfy the public purpose requirement of an exercise of the power of eminent domain, it is unclear whether the intrusive "character" of the condition (a requirement that appellants effectively convey a real property interest to the public with respect to a portion of their land) is sufficiently linked to any public burdens resulting from the proposed development as to justify its imposition without the payment of just compensation. Because neither the superior court nor the court of appeal undertook the factual or legal analysis necessary to resolve that issue, the case should be remanded.

We note that the California Coastal Act, on its face and as construed by the Coastal Commission's interpretive guidelines, raises substantial takings concerns. As reflected in those guidelines, the statutory trigger for imposing the lateral access condition on a development permit does not appear to be carefully linked to the burdens imposed by the development, as required by the Takings Clause, but instead appears to be more focused on the public need for access. See J.A. 357 (Cal. Pub. Res. Code § 30212 (West 1986) "focuses * * * on the appropriate-

(1984); *Land/Vest Properties, Inc.* v. *Town of Plainfield*, 117 N.H. 817, 823-824, 379 A.2d 200, 204-205 (1977); *Longridge Builders, Inc.* v. *Planning Board*, 52 N.J. 348, 350, 245 A.2d 336, 337 (1968)), and upheld permit conditions in other circumstances (see, *e.g.*, *City of College Station* v. *Turtle Rock Corp.*, 680 S.W.2d 802, 804, 806 (Tex. 1984); *Home Builders Ass'n* v. *City of Kansas City*, 555 S.W.2d 832, 834, 835 (Mo. 1977); *Jenad* v. *Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966)).

ness of access itself, rather than on any burdens which might be generated by particular types of development"); J.A. 358 ("recognizing these potential impacts of development, the Legislature has thus focused the application of Section 30212 on the appropriateness of access rather than on the type of development proposed").

In addition, even to the extent that the state statute recognizes that certain types of development, particularly replacement of residential dwellings, should not automatically require a dedication of lateral access (see Cal. Pub. Res. Code § 30212(b)(2) (West 1986); J.A. 360-361), the statutory measure for determining whether a specific replacement dwelling should trigger that requirement should be viewed with a somewhat jaundiced eye. As noted by the superior court below (J.A. 418), "[i]n a case such as [appellants'], a 10% enlargement of their tiny house would barely be enough to add a good-sized closet to their old floorplan * * *."[24]

This Court has repeatedly stressed "that the constitutionality of statutes ought not to be decided except in an actual factual setting that makes such a decision necessary [and that] [a]dherence to this rule is particularly important in cases raising allegations of an unconstitutional taking of private property." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 294-295 (1981); see *Connolly* v. *Pension Benefit Guaranty Corp.*, slip op. 1-2 (O'Connor, J., concurring); *Stephenson* v. *Binford*, 287 U.S. 251, 277 (1932); *City of College Station* v. *Turtle Rock Corp.*, 680 S.W.2d 802, 806 (Tex. 1984). The constitutionality of the Coastal Commission's requirement of lateral access before the Court, therefore, depends on its application in the particular circumstances

[24] Some state courts have commented on the problematic nature of permit conditions that are triggered by statutory measures based on percentages. See, *e.g.*, *Collis* v. *City of Bloomington*, 310 Minn. 5, 20, 246 N.W.2d 19, 27 (1976); *Ansuini* v. *City of Cranston*, 107 R.I. 63, 69-70, 264 A.2d 910, 913-914 (1970); see also *Hollywood, Inc.* v. *Broward County*, 431 So.2d 606, 610 (Fla. Dist. App. 1983) (population increase is better measure of public burden than amount of land involved).

of this case and not on what the Commission theoretically might do in a different case. See *United States* v. *Central Eureka Mining Company*, 357 U.S. 155, 168 (1958); *Nashville, C. & St. L. Ry.* v. *Walters*, 294 U.S. at 414-415; see also *Pacific Legal Foundation* v. *California Coastal Commission*, 33 Cal.3d 158, 172-174, 655 P.2d 306, 315-317, 188 Cal. Rptr. 104, 113-115 (1982); *Collis* v. *City of Bloomington*, 310 Minn. 5, 20, 246 N.W.2d 19, 27 (1976).

In analyzing the operation of the statute in this case, the court of appeal erred in focusing almost entirely on whether the condition furthered legitimate governmental goals and whether the condition left appellants with any economically viable use (see J.A. 421-427). As discussed above, neither of these factors is sufficient to defeat appellants' takings claim. To the extent, moreover, that the court of appeal considered at all the critical relationship of the burdens imposed on appellants by the dedication condition to the burdens imposed on the public by appellants' proposed development, the court undertook only the most cursory analysis. The court considered only whether some bare logical connection existed and never inquired, as required by the Fifth Amendment, into the reasonableness of that relationship either in terms of the character or degree of the burdens imposed.

In particular, the court of appeal failed to consider the significance to appellants' takings claim that the permit condition they challenged exacted a real property interest —an easement across a portion of their property—and, hence, interfered with appellants' "right to exclude." "The right to exclude others is generally 'one of the most essential sticks in the bundles of rights that are commonly [called] property.'" *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1011, quoting *Kaiser Aetna* v. *United States*, 444 U.S. at 176; see *Loretto*, 458 U.S. at 433 ("government intrusion of an unusually serious character"). The interference is especially acute in the case of a private homeowner because of "'the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic.'" *Oliver* v. *United States*, 466 U.S. 170, 178 (1984), quoting *Payton* v. *New York*, 445 U.S. 573, 601 (1980); see *PruneYard Shopping Center*, 447 U.S. at 94 (Marshall, J., concurring); *id.* at 95 (White, J., concurring); see also *Board of Supervisors* v. *Rowe*, 216 Va. 128, 138, 216 S.E. 199, 208 (1975). For this reason, as a general matter, exaction of a public easement over private residential property on an individual basis[25] is usually of such a fundamentally intrusive character[26] that the permitting authority can justify it only upon a showing that burdens

[25] Notably, concerns of the same character and magnitude are not present in the case of municipal exactions imposed on subdivisions. In those cases, the interference is neither so personal nor so fundamental. Cf. *PruneYard Shopping Center* v. *Robins*, 447 U.S. at 83-85; *Railway Express* v. *New York*, 336 U.S. 106, 116 (1949) (Jackson, J., concurring) ("it is one thing to tolerate action from those who act on their own and it is another thing to permit the same action to be promoted for a price"); see *Collis* v. *City of Bloomington*, 310 Minn. at 15, 246 N.W.2d at 25 ("In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion but simply attempting to maximize his profits from the sale of a finished product."); *Bd. of Supervisors* v. *Rowe*, 216 Va. at 138, 216 S.E.2d at 208 (application of permit condition to individual parcels substantially more troublesome than application to subdivider). In addition, the character of the burden on the public is more likely to be akin to that imposed on the developer in the subdivision case. A large development is, for example, likely to lead to increased use of public facilities and therefore may justify a municipal determination that approval of the subdivision should be conditioned on the subdivider's agreement to dedicate certain property to the public. See *ibid.* No doubt for these reasons, appellants acknowledge that a similar dedication requirement imposed on a subdivision proposal would be a far different matter under the Takings Clause. See J.A. 15.

[26] In this case, the courts below have not considered evidence in the record relating to the degree of interference with the right to exclude. This Court has previously recognized that the right to exclude is not always "so essential to the use or economic value of * * * property that the state-authorized limitation of it amount[s] to a taking" (*PruneYard Shopping Center* v. *Robins*, 447 U.S. at 84).

of a similarly intrusive quality would be imposed on the public by the proposed development.[27]

Three remaining issues raised by the record in this case suggest, however, that appellants may have relevantly diminished expectations of privacy in the property affected by the lateral access requirement, thus diminishing the significance of the right to exclude that is at issue in this case.[28] First, the California Constitution may support diminished private property expectations in the shore zone in California, including appellants' beach.[29] Second,

[27] In this case, the Commission's principal justification for the exaction is the loss of visual access to the coastal zone that would be caused by a dwelling that is substantially larger both in height and width than the existing dwelling (see J.A. 56-58, 65-66). We agree with the court of appeal and the superior court that such cumulative, contributing effects are important and well within the scope of a valid police power measure. We also agree with the Coastal Commission that protection of visual access to the coastal zone is an important public concern. The state and the nation properly place great importance on public access to California's magnificent coastline. Finally, we would also agree that the burden on the public implicated by appellants' permit application is, at least to a limited extent, of a similar character to that imposed on appellants—both share a common concern with public access. This case, therefore, does not present a challenge to a permit condition that is wholly unrelated to the activity being regulated. We do not believe, however, that in most cases, a potential loss of *visual* access is sufficient to justify exaction of *physical* access. Except perhaps when the magnitude of the former is sufficiently compelling to justify governmental denial of the permit altogether, the two interests are too fundamentally different in character to be in fair proportion, as required by the Fifth Amendment.

[28] Appellants also enjoy a "reciprocity of advantage" due to the Coastal Act's access dedication policy because it enables them to enjoy the beach in front of neighboring lots. See *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. at 415; see also *Penn Central Transp. Co.* v. *New York City*, 438 U.S. at 147 (Rehnquist, J., dissenting). "Appellants therefore will share with other owners the benefits and burdens of the city's exercise of its police power. In assessing the fairness of the [law], these benefits must be considered along with any diminution in market value that the appellants might suffer." *Agins* v. *City of Tiburon*, 447 U.S. at 262.

[29] Article X, Section 4 of the California Constitution has provided since 1879 that "[n]o individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a * * * navigable water in this state shall be permitted to exclude the right of way to such water." It is well settled that state law may, within bounds, define the scope of property rights in the first instance and, consequently, the meaning of this constitutional provision may bear on the taking issue in this case. See *Ruckelshaus* v. *Monsanto*, 467 U.S. at 1001; *Webbs Fabulous Pharmacies, Inc.* v. *Beckwith*, 449 U.S. at 161; *PruneYard Shopping Center* v. *Robins*, 447 U.S. at 82. While we cannot, of course, speak to this issue of state law with any authority, it does appear potentially relevant to the judicial inquiry in an appropriate takings analysis and should be considered by the state courts on remand.

there may have been longstanding historical use (over 45 years) by the public of the property at issue for the very purposes (passing and repassing) allowed by the permit condition.[30] Third, the nature of the property at issue, which has not been considered by the courts below, may similarly undercut the meaningfulness of the right to exclude at issue in this case.[31]

[30] Indeed, there was historical acceptance of that public use by prior owners, and appellants are apparently willing to accept that use in the future. See J.A. 48, 50, 67, 303. We note also that the beach property at issue is the object of a continuing boundary dispute between appellants and the Coastal Commission due to the inevitable uncertainty in determining the precise location of the historic mean high tide line. Indeed, there are suggestions in the record that the boundary may be at the seawall itself, if not impliedly dedicated to the public on the basis of past use. See *id.* at 69-70. Such uncertainty underscores the peculiar physical nature of the property at issue and the possibility that property expectations in such property may be of a less fundamental character.

[31] It is our understanding that the beach property that would be covered by the dedication is separated from the house and the immediate surrounding area by a seawall approximately eight feet tall. In the Fourth Amendment context, this Court has recognized the diminished expectations of privacy in property outside "the area immediately surrounding the home," particularly when "as a practical matter the[] land[] * * * is accessible to the public." *Oliver* v. *United States*, 466 U.S. at 178, 179. Although these concerns do not defeat a landowner's formal title, they nonetheless may be relevant to the issue whether a pass and repass easement amounts to an *unconstitutional* taking.

In conclusion, although the Coastal Commission bears a heavy burden on remand to justify the character of the condition it chose to impose on appellants, on the present record it cannot be said that such a showing plainly cannot be made. Because both the superior court and the court of appeal applied incorrect legal standards and failed to inquire into several potentially dispositive matters, remand is appropriate to permit the lower courts to apply the correct legal standard to the fact of this case in the first instance. See *Ansonia Board of Education* v. *Philbrook*, No. 85-495 (Nov. 17, 1986), slip op. 9-10; *City of Los Angeles* v. *Preferred Communications, Inc.*, No. 85-390 (June 2, 1986), slip op. 5-6.

CONCLUSION

The judgment of the court of appeal should be reversed and the case remanded for further proceedings.

Respectfully submitted.

CHARLES FRIED
Solicitor General

F. HENRY HABICHT II
Assistant Attorney General

DONALD B. AYER
Deputy Solicitor General

ROGER J. MARZULLA
THOMAS E. HOOKANO
DOUGLAS W. KMIEC
Deputy Assistant Attorneys General

RICHARD J. LAZARUS
Assistant to the Solicitor General

PETER R. STEENLAND, JR.
JOSEPH F. DIMENTO
RAYMOND B. LUDWISZEWSKI
Attorneys

DECEMBER 1986

☆ U. S. GOVERNMENT PRINTING OFFICE: 1986 181483 40150

AMICUS CURIAE

BRIEF

(9)

Supreme Court, U.S.
FILED
DEC 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

vs.

CALIFORNIA COASTAL COMMISSION,

Appellee.

APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT

BRIEF OF THE NATIONAL ASSOCIATION OF HOME BUILDERS AND CALIFORNIA BUILDING INDUSTRY ASSOCIATION AS AMICI CURIAE IN SUPPORT OF APPELLANTS

JERROLD A. FADEM
MICHAEL M. BERGER *
of FADEM, BERGER & NORTON
A Professional Corporation
501 Santa Monica Boulevard
Post Office Box 2148
Santa Monica, California 90406
Telephone: (213) 451-9951
*Counsel of Record

GUS BAUMAN
NATIONAL HOUSING CENTER
15th & M Streets N.W.
Washington, D.C. 20005
(202) 822-0359

December 19, 1986

Lawyers Brief Service / Legal Publishers / (213) 383-4457 / (714) 720-1510

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE AMICI CURIAE	1
SUMMARY OF ARGUMENT	3
ARGUMENT	5
I. THE GOVERNMENT MAY NOT UNREASONABLY CONDITION THE EXERCISE OF CONSTITUTIONAL RIGHTS	5
A. The Rule In The Federal Courts	6
B. The Rules In States Other Than California	9
II. CALIFORNIA'S RULE RELEGATES THE PROTECTION OF FEDERAL CONSTITUTIONAL RIGHTS TO THE WHIM OF ADMINISTRATIVE DISCRETION	17
III. THE CONSTITUTION PROHIBITS MEETING LEGITIMATE GOVERNMENTAL OBJECTIVES BY SUBJECTING INDIVIDUAL CITIZENS TO UNCOMPENSATED PHYSICAL OCCUPATION OF THEIR PROPERTY	26
CONCLUSION	29

TABLE OF AUTHORITIES

Cases	Page
Admiral Dev. Corp. v. City of Maitland, 267 So.2d 860 (Fla. App. 1972)	10
Agins v. City of Tiburon 447 U.S. 255 (1980)	5, 20
Arnett v. City of Mobile 449 So.2d 1222 (Ala. 1984)	23
Aunt Hack Ridge Estates, Inc. v. Planning Comm'n 273 A.2d 880 (Conn. 1970)	12
Baltimore Planning Comm'n v. Victor Dev. Co. 275 A.2d 478 (Md. 1970)	11
Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981)	13
Billings Properties, Inc. v. Yellowstone County 394 P.2d 182 (Mont. 1964)	11
Board of Supervisors v. Rowe 216 S.E.2d 199 (Va. 1975)	11
Brair West, Inc. v. City of Lincoln 291 N.W.2d 730 (Neb. 1980)	13, 15

	Page
Bynam v. Schiro 219 F. Supp. 204 (E.D. La. 1963) *aff'd* 375 U.S. 395 (1964)	8
Call v. City of West Jordan 614 P.2d 1257 (Utah 1980)	12, 13
City of College Station v. Turtle Rock Corp. 680 S.W.2d 802 (Tex. 1984)	13
Collis v. City of Bloomington 246 N.W.2d 19 (Minn. 1976)	2, 13, 15
Dames & Moore v. Regan 453 U.S. 654 (1981)	22
Delaware, L. & W. R. Co. v. Morristown 276 U.S. 182 (1928)	21
Dickman v. Commissioner 465 U.S. 330 (1984)	20
East Neck Estates, Ltd. v. Luchsinger 305 N.Y.S.2d 922 (N.Y. Super. 1969)	21
Frank Ansuini, Inc. v. City of Cranston 264 A.2d 910 (R.I. 1970)	11
Frost v. Railroad Commission 271 U.S. 583 (1926)	8, 17
Georgia-Pacific Corp. v. California Coastal Comm'n 132 Cal. App. 3d 678 (1982)	20

	Page
Griggs v. Allegheny County 369 U.S. 84 (1962)	27
Grupe v. California Coastal Comm'n 166 Cal. App.3d 148 (1985)	17-19
Hawaii Housing Authority v. Midkiff 467 U.S. 229 (1984)	27
Home Builders Association of Central Arizona Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973)	15
Howard County v. JJM, Inc. 482 A.2d 908 (Md. 1984)	13
J.E.D. Associates, Inc. v. Town of Atkinson 432 A.2d 12 (N.H. 1981)	2, 13, 16
Jenad, Inc. v. Village of Scarsdale 218 N.E.2d 673 (N.Y. 1966)	12
Jordan v. Village of Menomonee Falls 137 N.W.2d 442 (Wis. 1965)	12
Kaiser Aetna v. United States 444 U.S. 164 (1979)	5, 20-22, 25-27
Kamhi v. Planning Bd. 452 N.E.2d 1193 (N.Y. 1983)	13
Lampton v. Pinaire 610 S.W.2d 915 (Ky. App. 1980)	13

	Page
Land/Vest Properties, Inc. v. Town of Plainfield 379 A.2d 200 (N.H. 1977)	14
Littlefield v. City of Afton 785 F.2d 596 (8th Cir. 1986)	7
Loan Ass'n v. Topeka (20 Wall.) 87 U.S. 655 (1875)	25
Longridge Builders, Inc. v. Planning Bd. 245 A.2d 336 (N.J. 1968)	13, 15
Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982)	5, 21, 23, 27
MacDonald, Sommer & Frates v. County of Yolo 477 U.S. __, 106 S. Ct. 2561 (1986)	5
MacKall v. White 445 N.Y.S.2d 486 (N.Y. App. 1981)	21, 22
McDonald v. Mabee 243 U.S. 90 (1917)	2
McKain v. City Plan. Comm'n 279 N.E.2d 370 (Ohio App. 1971)	11
McNabb v. United States 318 U.S. 332 (1943)	4
Nollan v. California Coastal Comm'n 177 Cal. App.3d 719 (1986)	17, 19

	Page
Norwood v. Baker 172 U.S. 269 (1898)	14
Olmstead v. United States 277 U.S. 438 (1928)	3
Parks v. Watson 716 F.2d 646 (9th Cir. 1983)	7, 8
Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)	5, 20, 27
Pennsylvania Coal Co. v. Mahon 260 U.S. 393 (1922)	4, 23, 25
Perry v. Sindermann 408 U.S. 593 (1972)	6-8, 17
Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961)	10
Pumpelly v. Green Bay Co. 13 Wall. (80 U.S.) 166 (1871)	27
Remmenga v. California Coastal Comm'n 163 Cal. App. 3d 623 (1985), *app. dismissed,* 106 S. Ct. 241	17-19
Regional Rail Reorganization Act Cases 419 U.S. 986 (1984)	22
Ruckelshaus v. Monsanto Co. 467 U.S. 986 (1984)	22

	Page
San Diego Gas & Elec. Co. v. City of San Diego 450 U.S. 621 (1981)	5
Schwing v. City of Baton Rouge 249 So.2d 304 (La. App. 1971)	10
Shelton v. Tucker 364 U.S. 479 (1960)	4
Simpson v. City of North Platte 292 N.W.2d 297 (Neb. 1980)	11, 23
Stanley v. Illinois 405 U.S. 645 (1972)	4
State ex rel. Noland v. St. Louis County 478 S.W.2d 363 (Mo. 1972)	11
Town of Longboat Key v. Lands End, Ltd. 433 So.2d 574 (Fla. App. 1983)	13
Trent-Meredith, Inc. v. City of Oxnard 114 Cal. App. 3d 317 (1981)	20
United States v. Causby 328 U.S. 256 (1946)	27
United States v. Security Indus. Bank 459 U.S. 70 (1982)	21
Whaler's Village Club v. California Coastal Comm'n 173 Cal.App.3d 240 (1985), *app. dismissed* 106 S. Ct. 1962	17-19

	Page
Watson v. Memphis 373 U.S. 526 (1963)	28
West Park Ave., Inc. v. Township of Ocean 224 A.2d 1 (N.J. 1966)	2, 23
Wilkerson v. Johnson 699 F.2d 325 (6th Cir. 1983)	8
Williamson County Reg. Plan. Comm'n v. Hamilton Bank, 473 US __, 105 S. Ct. 3108 (1985)	3, 5

Texts

Berger, You Can't Win Them All — Or Can You?, 54 Cal. St. B. J. 16 (1979)	4
Bley, Exactions in the 1980s, Institute on Planning, Zoning, and Eminent Domain 297 (S.W. Legal Foundation 1984)	13
Comment, Public ~~Access~~ and the California Coastal Commission: A Question of Overreaching, 21 Santa Clara Law. (1981)	26
Connors & Meacham, Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?, Institute on Planning, Zoning, and Eminent Domain ch. 2 (S.W. Legal Foundation 1986)	13

	Page
Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L. J. 385 (1977)	16
Exactions Symposium, 50 Law & Contemp. Probs. No. 1 (Winter 1987)	5
Hale, Unconstitutional Conditions and Constitutional Rights, 35 Colum. L. Rev. 321 (1935)	6
Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Corn. L. Q. 871 (1967)	2
Juergensmeyer & Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St. U.L. Rev. 415 (1981)	2, 13
Kratovil, Eminent Domain Revisited and Some Land Use Problems, 34 De Paul L. Rev. 587 (1985)	27
Michelman, Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law, 80 Harv. L. Rev. 1165 (1967)	27
Note, Unconsitutional Conditions, 73 Harv. L. Rev. 1595 (1960)	6
Reps & Smith, Control of Urban Land Subdivision 14 Syracuse L. Rev. 405 (1963)	13, 15

	Page
Staples, Exaction — Mandatory Dedications and Payments in Lieu of Dedication, Institute on Planning, Zoning and Eminent Domain (S.W. Legal Foundation 1980)	10, 13
Tabor, The California Coastal Commission and Regulatory Takings, 17 Pac. L. J. 863 (1986)	26

Publications

Policzer, "From the Courts," Los Angeles Daily Journal, October 29, 1985, pt 2, p 1	25

Ordinances

Los Angeles Preliminary Transit Corridor Specific Plan (1984)	24
Monterey Ord. No. 2416 C.S. (1980)	24
San Francisco Downtown Plan (1985)	24
San Francisco Office/Housing Production Program (1982)	24
San Francisco Transit Impact Development Fee Ordinance (San Francisco Admin. Code §§38.1 *et seq.*	24
Santa Monica General Plan: Land Use and Circulation Elements (1984)	24

Constitution

United States Constitution, Fifth Amendment	4, 25

The National Association of Home Builders and the California Building Industry Association have received the parties' written consent to file this brief as *Amici Curiae* in support of the Appellants and have filed their letters of consent with the Clerk of this Court.

INTEREST OF THE AMICI CURIAE

The National Association of Home Builders represents 142,000 builder and associate members organized in approximately 800 affiliated state and local associations in all fifty states, the District of Columbia, and Puerto Rico. Its members include not only those who create single-family homes but also apartment, condominium, commercial, and industrial builders, as well as land developers and remodelers. It is the voice of the American shelter industry.

The California Building Industry Association, the state affiliate of the National Association of Home Builders, is a federation of seven local and regional associations representing 5,400 members who build most of California's housing.

As some local government budgets have become tighter, government agencies have bent their not inconsiderable talents toward creating new ways to finance projects thought to be desirable. One tactic whose use has been rapidly expanding is to have others finance public projects by targeting a discrete section of the populace at a particularly vulnerable time: property owners seeking permits to use or improve their land.

Some government agencies have discovered that, if they can link the issuance of development-related permits to

requiring "donation" of land, or provision of some public service, or payment of cash "in lieu" thereof, the agencies can cause those who wish to use or improve their property to bridge the gap between shrinking governmental budgets and the demand for public projects or services.[1]

Judicial reaction to such exactions has not been uniform. While most state courts occupy a middle ground, permitting exactions *IF* there is a rational relationship between the use proposed by the property owner and creation of the need for the exaction, there are occupants of both extremes. One extreme is before the Court in this case. In California, virtually anything goes. Governmental agencies may exact what they will and the California courts sustain it. At the same time, courts in other states have compared similar exactions to criminal acts. (*J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14 [N.H. 1981] ["extortion"]; *Collis v. City of Bloomington*, 246 N.W.2d 19, 26 [Minn. 1976] ["grand theft"]; *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1, 4 [N.J. 1966] ["illegally extorted"].)

---

1 That government agencies like to characterize these exactions as "donations" or "dedications," voluntarily given as a condition to development approval, should not mask the reality of the situation. (Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 Corn. L. Q. 871, 876-81 [1967]) "As a practical matter, most developers are forced to comply with the requirements laid down by local governments because of the prohibitively expensive financing and opportunity costs incurred as a result of protracted delay caused by litigation." (Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 Fla. St. U.L. Rev. 415, 417, n. 9 [1981]) Thus, any "donation" is purely fictional. As this Court wisely admonished through Justice Holmes:

> ". . . in states bound together by a Constitution and subject to the 14th amendment, great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to fact." (*McDonald v. Mabee*, 243 U.S. 90, 91 [1917])

Some uniformity seems required in the way in which Constitutionally protected property rights are treated in the state courts.[2]

Our interest lies in seeing that the law in this field remains consistent, fair, and cognizant of the need to protect the rights of the individual when confronted with well-meaning government officials whose actions to achieve a public good may impinge on Constitutional guarantees. As Justice Brandeis insightfully admonished:

> "Experience should teach us to be most on our guard to protect liberty when government's purposes are beneficent. . . . The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding." (*Olmstead v. United States*, 277 US 438, 479 [1928] [Brandeis, J., dissenting].)

SUMMARY OF ARGUMENT

Ends and means. That is what this case is about.

The Coastal Commission and the California courts focus on what they view as the need of Californians for greater enjoyment of coastal amenities. Mr. and Mrs. Nollan would be among the last to deny the beneficial effects of the coast. That is why they chose to buy a coastal lot and build a home there for themselves and their children.

Thus, the question is not whether it is good to enable people to enjoy beaches. The question is *how* can government, in our Constitutional system, go about achieving its desire?

---

2 This seems particularly pertinent in light of this Court's expressed preference for seeing such issues litigated in state courts. (*Williamson County Reg. Plan. Comm'n v. Hamilton Bank*, 473 US ___, 105 S. Ct. 3108 [1985])

This Court has often cautioned that the means chosen by government officials to meet perceived public needs must be carefully scrutinized for Constitutional conformity:

> "[T]he Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill of Rights in general, and of the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more than mediocre ones." (*Stanley v. Illinois*, 405 U.S. 645, 656 [1972]; footnote omitted.)[3]

To meet its perceived needs, California has cast its net too broadly. As will be seen, the bedrock Constitutional principle underlying conditions and exactions is that they are valid only to the extent that they bear a reasonable relationship to needs created by the permit being sought.

California's rule, particularly as it is applied in litigation involving the Coastal Commission,[4] eliminates the need for any rational relationship. It upholds the kind of confiscatory actions that the Fifth Amendment was designed to preclude. It merits disapproval.

---

[3] *See also Shelton v. Tucker*, 364 U.S. 479, 488 (1960); *McNabb v. United States*, 318 U.S. 332, 347 (1943); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922).

[4] For an analysis of the tender treatment reserved for the Commission by the California courts, see Berger, *You Can't Win Them All — Or Can You?*, 54 Cal. St. B. J. 16 (1979). (The article was written by the lead author of this brief.)

ARGUMENT

I. THE GOVERNMENT MAY NOT UNREASONABLY CONDITION THE EXERCISE OF CONSTITUTIONAL RIGHTS

While this Court has been quite active in land use cases recently, it has not yet dealt with any case questioning the ability of a state or local government agency to condition the issuance of a land use permit on the exaction, "donation," or "dedication" of property by the permit applicant. [5]

The exaction issue is important, has produced varying responses from state courts (all purporting to interpret the same Constitutional protection against confiscation of property), and will likely grow in significance as financially pressed government agencies continue their efforts to obtain something for nothing by conditioning the grant of permits on the "donation" or "dedication" of property.[6]

For, at bottom, what happened here is that private citizens have been told that the only way to obtain a permit to build

---

[5] This Court has, of course, reviewed issues involving the Constitutionality of police power regulations in other contexts. (*See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 [1978]; *Kaiser Aetna v. United States*, 444 U.S. 164 [1979]; *Agins v. City of Tiburon*, 447 U.S. 255 [1980]; *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621 [1981]; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 [1982]; *Williamson County Reg. Plan Comm'n v. Hamilton Bank*, 473 U.S. __; 105 S. Ct. 3108 [1985]; *MacDonald, Sommer & Frates v. County of Yolo*, 477 US __; 106 S. Ct. 2561 [1986].)

The compensation issue is again before the Court this Term (*First English Evangelical Lutheran Church v. County of Los Angeles*, No. 85-1199), as is the validity of a statute that takes the use of property (*Keystone Bituminous Coal Ass'n v. Duncan*, No. 85-1092).

[6] See forthcoming *Exactions Symposium*, 50 Law & Contemp. Probs. No. 1 (Winter 1987).

their home is by forfeiting a right guaranteed by the Constitution: They must give property to the government for public use and receive no compensation. The question before the Court is under what circumstances can such forfeiture be compelled?

A. The Rule In The Federal Courts

This Court is no stranger to governmental attempts to condition the receipt of some governmental benefit on the surrender of a Constitutional right. In *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), this Court held — in no uncertain terms — that the government could not circumvent the Constitution in that fashion:

> "For at least a quarter century, this Court has made clear that even though a person has no 'right' to a valuable governmental benefit and even though the government may deny him the benefit for any number of reasons, there are some reasons upon which the government may not rely. *It may not deny a benefit to a person on a basis that infringes his constitutionally protected interests* . . . . For if the government could deny a benefit to a person because of his constitutionally protected [rights], *his exercise of those freedoms would in effect be penalized and inhibited.* This would allow the government to 'produce a result which [it] could not command directly.' [Citation.] Such interference with constitutional rights is impermissible." Emphasis added.)[7]

[7] For analyses of earlier decisions of this Court, see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 Colum. L. Rev. 321 (1935); Note, *Unconstitutional Conditions*, 73 Harv. L. Rev. 1595 (1960).

Building on this Court's decision in *Perry*, the Ninth Circuit Court of Appeals recently applied it in the context of a condition to a land use permit which required "dedication" of property. In *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), a property owner sought to have a city vacate "paper" streets[8] so apartments could be built. The city was amenable, but conditioned the "vacation" of the nonexistent streets on the property owner's giving to the city property containing valuable geothermal wells.[9] The court lost little time in concluding that the city's desire to own the geothermal wells did not give it the right to extort dedication of the wells because of the serendipitous appearance of their owner seeking a permit to undertake activity unrelated to geothermal wells:

> "Both case authority and scholarly commentary indicate that a condition requiring an applicant for a governmental benefit to forgo a constitutional right is unlawful if the condition is not rationally related to the benefit conferred." (716 F.2d at 652)
>
> "Since the requirement that Klamath Valley Company give its geothermal wells to the City had no rational relationship to any public purpose related to the vacation of the platted streets, the unrelated purpose does not support the requirement that the company surrender its property without just compensation. . . . The condition violates the fifth amendment." (716 F.2d at 653)

A similar situation occurred in *Littlefield v. City of Afton*, 785 F.2d 596 (8th Cir. 1986). There, the city sought to condition the construction of a single residence on the property owners' dedication of an easement to permit

[8] *I.e.*, streets that appeared on the City's general plan for future construction but did not exist as traveled ways.

[9] These produce steam and hot water created by the earth's magma when the magma is close to the surface. The heat energy is used to produce electrical power.

access to a neighboring landlocked parcel owned by others. Relying, *inter alia,* on this Court's decision in *Perry* and the Ninth Circuit's decision in *Parks,* the court concluded that:

> "... appellants stated a substantive due process claim when they alleged that the City acted capriciously and arbitrarily and imposed an unconstitutional condition on the granting of the permit." (785 F.2d at 607)

See also Wilkerson v. Johnson, 699 F.2d 325, 328 (6th Cir. 1983) [illegal conditions attached to barbershop permit]; *Bynam v. Schiro,* 219 F. Supp. 204, 210 (E.D. La. 1963) (three judge District Court), *aff'd* 375 U.S. 395 (1964) [illegal condition on permit to use city auditorium that speakers advocate segregation].[10]

This Court dealt with a related matter (also arising in California) 60 years ago in *Frost v. Railroad Commission,* 271 U.S. 583 (1926). There, by regulation, California conditioned the issuance of permits to private truckers to use the highways on agreement by the private carriers to assume the duties and burdens of public carriers. In holding that the right to use the highways could not be so conditioned, this Court spoke in words that provide a fitting template for the case at bench and its requirement of a fictional donation of an easement in exchange for development permission:

> "Having regard to form alone, the act here is an offer to the private carrier of a privilege, which the state may grant or deny, upon a condition, which the carrier is free to accept or reject. *In reality, the carrier is given no choice, except a choice between the rock and the whirlpool, — an option to forego a privilege which may be vital to his livelihood, or to*

10 "... the City has no power to make its license to an auditorium-user depend on the licensee's giving up a constitutional right." (219 F. Supp. at 210)

submit to a requirement which may constitute an intolerable burden.

> "It would be a palpable incongruity to strike down an act of state legislation which, by words of express divestment, seeks to strip the citizen of rights guaranteed by the Federal Constitution, but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that *it may not impose conditions which require the relinquishment of constitutional rights.* If the state may compel the surrender of one constitional right as a condition of its favor, it may, in like manner, compel a surrender of all. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." (271 U.S. at 593-94; emphasis added.)

The bedrock federal Constitutional precept is that the government may not condition the grant of any benefit on the surrender of a Constitutional right.

B. The Rules In States Other Than California

The state courts have developed several variants of the test to determine whether an exaction is Constitutional. All except California require *some* rational and substantial nexus between the condition imposed by the government

and the need created by the proposed project.[11]

Illinois is perhaps the most vigilant in protecting the rights of the individual. Its courts will not permit an exaction absent a direct cause and effect relationship between the action proposed by the property owner and the exaction demanded by the government:

> "If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *specifically and uniquely attributable to his activity,* then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power." (*Pioneer Trust & Sav. Bank v. Village of Mount Prospect,* 176 N.E.2d 799, 802 [Ill. 1961]; emphasis added.)

This approach of strictly protecting individual rights has also been applied in other states. (*See Admiral Dev. Corp. v. City of Maitland,* 267 So.2d 860 [Fla. App. 1972]; *Schwing v. City of Baton Rouge,* 249 So.2d 304 [La. App.

---

11 One commentator concluded an exhaustive examination of state court decisions as follows:

> "All these tests, *with the possible exception of those used in California,* attempt to examine the needs of the area being subdivided or the burdens it will place on public facilities and then determine whether the exaction in some way meets the need or offsets the burden. *The California court, while parroting constitutionally required reasonableness, states its rule in no-win language* and requires the developer to bear the burden of proving that there is no reasonable relationship between the dedication requirement and health, safety, and general welfare. Note, however, that *this test completely ignores the question of confiscation as though it never arises."* (Staples, *Exaction — Mandatory Dedications and Payments in Lieu of Dedication,* Institute on Planning, Zoning, and Eminent Domain 111, 119 [S.W. Legal Foundation 1980]; emphasis added.)

1971]; *Baltimore Planning Comm'n v. Victor Dev. Co.,* 275 A.2d 478 [Md. 1970]; *State ex rel. Noland v. St. Louis County,* 478 S.W.2d 363 [Mo. 1972]; *Billings Properties, Inc. v. Yellowstone County,* 394 P.2d 182 [Mont. 1964]; *Simpson v. City of North Platte,* 292 N.W.2d 297 [Neb. 1980]; *McKain v. City Plan. Comm'n,* 270 N.E.2d 370 [Ohio App. 1971]; *Frank Ansuini, Inc. v. City of Cranston,* 264 A.2d 910 [R.I. 1970]; *Board of Supervisors v. Rowe,* 216 S.E.2d 199 [Va. 1975].)

The Illinois rule was slightly modified by the Wisconsin Supreme Court because of a concern that casting the rule in terms of problems ". . . specifically and uniquely attributable . . ." to the applicant might place so heavy a burden of proof on government agencies that no conditions would ever be valid. The Court therefore placed an interpretive gloss on the phrase ". . . specifically and uniquely attributable . . ." which protected the individual but also permitted the government to append rationally related conditions:

> "We deem this to be an acceptable statement of the yardstick to be applied, provided the words 'specifically and uniquely attributable to his activity' are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality which has enacted the ordinance under attack. In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, a municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications

required of subdividers be utilized for school, park, and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider. Possible contravening evidence would be a showing that the municipality prior to the opening up of the subdivisions, acquired sufficient lands for school, park, and recreational purposes to provide for future anticipated needs including such influx, or that the normal growth of the municipality would have made necessary the acquisition irrespective of the influx caused by opening up of subdivisions.

"There also may be situations, unlike the instant one, where there is no substantial influx from the outside and the proposed subdivision only fulfills a purely local need within the community. In those situations it may be more difficult to adduce proof sufficient to sustain a land-dedication requirement.

"We conclude that a required dedication of land for school, park, or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power *if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision.*" (*Jordan v. Village of Menomonee Falls,* 137 N.W.2d 442, 447 [Wis. 1965]; emphasis added.)

The Wisconsin gloss on the Illinois rule has often been followed. (*E.g., Aunt Hack Ridge Estates, Inc. v. Planning Comm'n,* 273 A.2d 880 [Conn. 1970]; *Jenad, Inc. v. Village of Scarsdale,* 218 N.E.2d 673 [N.Y. 1966]; *Call v. City of West Jordan,* 614 P.2d 1257 [Utah 1980].)

More recently, the rule generally being applied in state courts is that the condition or exaction is valid *if* it is rationally related to the applicant's proposed action. "Rationally related" means there must be some nexus between the problem caused by the applicant and the quid pro quo demanded by the government. (*See Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 668 [Colo. 1981]; *Town of Longboat Key v. Lands End, Ltd.,* 433 So.2d 574 [Fla. App. 1983]; *Lampton v. Pinaire,* 610 S.W.2d 915 [Ky. App. 1980]; *Howard County v. JJM, Inc.,* 482 A.2d 908 [Md. 1984]; *Collis v. City of Bloomington,* 246 N.W.2d 19 [Minn. 1976]; *Briar West, Inc. v. City of Lincoln,* 291 N.W.2d 730 [Neb. 1980]; *J.E.D. Associates v. Town of Atkinson,* 432 A.2d 12 [N.H. 1981]; *Longridge Builders, Inc. v. Planning Bd.,* 245 A.2d 336 [N.J. 1968]; *Kamhi v. Planning Bd.,* 452 N.E.2d 1193 [N.Y. 1983]; *City of College Station v. Turtle Rock Corp.,* 680 S.W.2d 802 [Tex. 1984]; *Call v. City of West Jordan,* 614 P.2d 1257 [Utah 1980]; *see generally* Bley, *Exactions in the 1980s,* Institute on Planning, Zoning, and Eminent Domain 297, 314 [S.W. Legal Foundation 1984]; Connors & Meacham, *Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?,* Institute on Planning, Zoning, and Eminent Domain ch. 2 at 2-12, 2-16 [S.W. Legal Foundation 1986]; Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 Fla. St. U. L. Rev. 415, 430-33 [1981]; Reps & Smith, *Control of Urban Land Subdivision,* 14 Syracuse L. Rev. 405, 407 [1963]; Staples, *Exaction — Mandatory Dedications and Payments in Lieu of Dedication,* Institute on Planning, Zoning, and Eminent Domain 111, 120-23 [S.W. Legal Foundation 1980].)

State courts have also recognized a relationship between development exactions and special assessment districts,

and have often analyzed the validity of each by reference to the other. In assessment district cases, property owners in a specified area are assessed the cost of installing public improvements (*e.g.*, new or improved streets, curbs, gutters, street lights, etc.). The cost is spread among the property owners according to the benefit they receive from the improvements. But the Constitutional proscription against the uncompensated taking of private property for public use precludes assessing an owner *more* than he benefits.[12]

See, e.g., Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200, 204 (N.H. 1977) in which an unreasonable exaction was struck down:

> "In resolving this issue, analogy may be made to the law governing special assessments. The special assessment a town may charge a landowner for a public improvement which, in part, specially benefits his property can be compared to defendant's subdivision exaction. [Citation.] To the extent that it applies private property to public use, the special assessment, like the subdivision exaction is restricted by the principle of just compensation . . . '"[S]pecial assessments upon property for the cost of public improvements are in violation of our Constitution if they are in substantial excess of the [equivalent in special] benefits received."' [Citations.] These special benefits constitute the just compensation to which the specially assessed landowner is entitled. [Citation.]
>
> "In view of the analogous deprivation of property worked by a special assessment and a subdivision exaction, it would be plainly unfair to circumvent in the subdivision context the protection guaranteed by the proportionality required of special assessments."

See also Home Builders Association of Central Arizona, Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973); *Briar West, Inc. v. City of Lincoln,* 291 N.W.2d 730, 733 (Neb 1980); *Longridge Builders, Inc. v. Planning Bd.,* 245 A.2d 336, 337-38 (N.J. 1968); Reps & Smith, *Control of Urban Land Subdivision,* 14 Syracuse L. Rev. 405, 407-09 (1963).

Where no obviously rational relationship exists, exactions have been denounced in stinging terms:

> "While in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create — *i.e.*, greater needs for municipal services and facilities — the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become *grand theft.*" (*Collis v. City of Bloomington,* 246 N.W.2d 19, 26 [Minn. 1976]; emphasis added.)

---

12 This Court's views on special assessments were emphatically stated by Justice Harlan in *Norwood v. Baker,* 172 U.S. 269, 278-79 (1898):

> "But the power of the legislature in these matters is not unlimited. There is a point beyond which the legislative department, even when exerting the power of taxation, may not go consistently with the citizen's right of property. . . . [T]he guaranties for the protection of private property would be seriously impaired, if it were established as a rule of constitutional law, that the imposition by the legislature upon particular private property of the entire cost of a public improvement, irrespective of any peculiar benefits accruing to the owner from such improvements, could not be questioned by him in the courts of the country."

"Regulation H requires the dedication of seven-and-one-half per cent of the total land comprising the subdivision without any consideration of the town's need for the land. Moreover, there is evidence, that was improperly excluded, which indicates that some developers would be permitted to pay the town the value of the land in lieu of its dedication. This appears to us to be *an out-and-out plan of extortion* whereby developers are required to pay for the privilege of using their land for valid and reasonable purposes even though it satisfies all other requirements of the town's zoning and subdivision regulations.

* * *

"Municipal officials having authority to adopt ordinances and regulations have a constitutional duty to observe these [constitutional] protections [of private property rights]. They may not attempt to *extort* from a citizen a surrender of his right to just compensation for any part of his property that is taken from him for public use as a price for permission to exercise his right to put his property to whatever legitimate use he desires subject only to reasonable regulation." (*J.E.D. Associates, Inc. v. Town of Atkinson*, 432 A.2d 12, 14-15 [N.H. 1981]; emphasis added.)

Thus, while there are several variants of the exaction rule in state courts, all — except California — seek to protect the rights of the individual against overreaching demands of the government by requiring a rational relationship between the exaction imposed by the government and the action proposed by the property owner.[13]

---

13 *See* Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 Yale L. J. 385, 481-86 (1977).

II. CALIFORNIA'S RULE RELEGATES THE PROTECTION OF FEDERAL CONSTITUTIONAL RIGHTS TO THE WHIM OF ADMINISTRATIVE DISCRETION

Plainly, there must be some limit on the ability of government agencies to impose conditions on the issuance of permits. Otherwise, no citizen's rights as to anything would be secure. This Court's admonition in *Frost v. Railroad Commission*, 271 U.S. 583, 594 (1926) bears repetition:

> "If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel a surrender of all."[14]

The California exaction rule is exemplified by four contemporary Coastal Commission cases, of which the case at bench is the most recent: *Remmenga v. California Coastal Comm'n*, 163 Cal. App. 3d 623 (1985), *app. dismissed*, 106 S. Ct. 241 [Chief Justice Burger and Justices Rehnquist and Brennan would have noted probable jurisdiction]; *Grupe v. California Coastal Comm'n*, 166 Cal. App. 3d 148 (1985); *Whaler's Village Club v. California Coastal Comm'n*, 173 Cal. App. 3d 240 (1985), app. dismissed for want of jurisdiction, 106 S. Ct. 1962; *Nollan v. California Coastal Comm'n*, 177 Cal. App. 3d 719 (1986) [the case at bench].

The theory uniting these cases, which places California outside the rule applied elsewhere, is that, while the California courts generally pay lip service to the concept that exactions must bear a reasonable relationship to the

---

14 *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972), listing numerous decisions of this Court invalidating conditions placed on obtaining some governmental benefit, even those denominated mere privileges rather than rights.

permit being sought,[15] their actions belie that assertion. These California cases apply the relationship rule in such an extreme manner that virtually *any* governmental desire suffices to supply that relationship.

In stark contrast to all of the cases (state and federal) discussed earlier, California does not require that the action of the permit applicant bear any cause and effect relationship to the problem sought to be remedied by the condition.

Consider the facts. In *Remmenga*, the property owner sought to construct one house on a 106 acre parcel. He was required to pay $5,000 (in lieu of dedicating property for access to the beach)[16] into a fund to acquire beach access elsewhere. In *Grupe*, the property owner sought to build one home on a 15,000 square foot lot. He was required to dedicate a public access easement over two thirds of his lot. In *Whaler's Village*, condominium owners sought to protect their existing homes from an ocean storm that had undermined one and threatened to destroy others. The condominium owners were required to dedicate to the state the right for the public to use the condominium's private beach. In the case at bench, the

---

15 *Remmenga*, 163 Cal. App. 3d at 627; *Grupe*, 166 Cal. App. 3d at 164; *Whaler's Village*, 173 Cal. App. 3d at 259.

See the analysis of Mr. Staples quoted above in note 11, regarding California's ". . . parroting [the language of] constitutionally required reasonableness . . ."

In the case at bench the Court of Appeal, perhaps encouraged by the refusal of either this Court or the California Supreme Court to intervene in *Remmenga*, Grupe or *Whaler's Village*, dropped even the pretense of lip service. It candidly said that ". . . the Nollans' project has not created the need for access to the tidelands. . ." (177 Cal. App. 3d at 723) and then concluded that the absence of any causal relationship was irrelevant.

16 He could not dedicate property for beach access because the closest part of his 106 acre parcel was more than a mile inland from the beach.

Nollans sought to replace a neighborhood eyesore with a larger (but still modest) home. To gain permission to reconstruct their home, the Nollans were required to dedicate a public access easement over one third of their lot.

Nothing in any of the four cases showed that the proposed construction would have *any* impact on the public's access to the coast. Here, the court was forthright: ". . . the Nollans' project has not created the need for access to the tidelands . . ." (177 Cal. App. 3d at 723)

In each of the four cases, the California Court of Appeal acknowledged this non-impact but held it irrelevant. As the Court of Appeal put it in the case at bench, ". . . a direct burden on public access need not be demonstrated . . ." (177 Cal. App. 3d at 723)

Why? Because in the view of the California courts, one must examine the construction of a single home (even on a lot already put to residential use for many years) in the context of the entire 1,000 mile coastline of California. (*Remmenga*, 163 Cal. App. 3d at 630 [". . .a link in a chain barring access . . ." (citing generalized studies of the entire coastal zone)]; *Grupe*, 166 Cal. App 3d at 167 [". . . one more brick in the wall . . ."]; *Whaler's Village*, 173 Cal. App. 3d at 260 [quoting *Remmenga*]; *Nollan*, 177 Cal. App. 3d at 723 [citing *Remmenga* and *Grupe*.]) As the Court put it in *Remmenga:*

> "A regulatory body may constitutionally require a dedication of property in the interest of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and *the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it.* [Citations.]" (163 Cal. App. 3d at 629; emphasis added;

quoting with approval from an earlier Coastal Commission case.)

By definition, a "rational relationship" must have some basis. Here, the concern is development of the California coastal area in a way that balances the rights of the owners of coastal property and other citizens. When demanding that a particular property owner in a specific area "donate" property to the state before being permitted to build anything on his land, there should be some rational relationship between the proposed development and the "donation."[17]

---

[17] Part of the California problem lies in the philosophical belief of the California courts that property owners have no right to do anything with their land. The ability to use land is seen as a privilege. (*See, e.g., Trent-Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3d 317, 328 [1981]; *Georgia-Pacific Corp. v. California Coastal Comm'n*, 132 Cal. App. 3d 678, 699 [1982].) This concept seems plainly at odds with this Court's holdings that property owners have the right to make economically viable use of their land. (*See, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 [1980]; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [majority], 143-44 [dissent] [1978]; *Kaiser Aetna v. United States*, 444 U.S. 164, 174, n. 8 [1979].) As recently noted:

> "Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." (*Dickman v. Commissioner*, 465 U.S. 330, 336, [1984])

Good intentions are irrelevant.[18] So is power. As this Court said in *Kaiser Aetna v. United States*, 444 U.S. 164, 174 (1979):

> "In light of its expansive authority under the Commerce Clause, there is no question but that Congress could assure the public a free right of access to the Hawaii Kai Marina if it so chose. Whether a statute or regulation that went so far amounted to a 'taking,' however, is an entirely separate question. [Citation.]"[19]

That it may be a good thing to provide additional access to California's coast does not mean the state may achieve

---

[18] In a case involving strikingly similar facts, a New York court reached precisely the opposite result of the California court in this case:

> ". . . a condition may be imposed upon property so long as there is a reasonable relationship between the problem sought to be alleviated and the application concerning the property. In the case at bar, no such relationship exists. As Special Term properly found, there is currently no lawful, public access to the beach over the petitioner's property. The proposed subdivision will in no manner alter this state of affairs. While the problem of diminishing access to the beach is a matter of serious public concern (see Executive Law, at 912, subd 1), it is not one which can properly be alleviated by requiring petitioner to dedicate a portion of her property to public use." (*Mackall v. White*, 445 N.Y.S.2d 486 [N.Y. App. 1981]; *see also East Neck Estates, Ltd. v. Luchsinger*, 305 N.Y.S.2d 922 [N.Y. Super. 1969] [demand for dedication of $92,000 worth of beach front as condition for permit to develop remainder of $208,000 tract held confiscatory and invalid].)

[19] This same concept that action may be appropriate for the government to take and still require compensation to make it Constitutionally acceptable has been oft repeated. (*See, e.g., Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 425 [1982]; *United States v. Security Indus. Bank*, 459 U.S. 70, 75 [1982]; *Delaware, L. & W. R. Co. v. Morristown*, 276 U.S. 182, 193 [1928].)

that goal any way it wills.[20] As in *Kaiser Aetna*, whether the means constitutes a taking " . . . is an entirely separate question." *That* question is the one before this Court. For California to answer it Constitutionally, there must in fact exist a rational relationship between the proposed use and the imposed exaction.

The only "impediment" to access after construction of the Nollans' home is the same one which existed before: the land is privately owned. (*Compare Mackall v. White*, 445 N.Y.S.2d 486 [N.Y. App. 1981], quoted above in note 18.) But this Court concluded in a classic opinion that that "impediment" can only be removed by the Constitutional means of purchasing access:

> "The rights of the public in a street purchased or laid out by eminent domain are those that it has paid for. If in any case its representatives have been so shortsighted as to acquire only surface rights, without the right of support, we see no more authority for supplying the latter without compensation than there was for taking the right of way in the first place, and refusing to pay for it because the public wanted it very much. *The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation.* A similar assumption is made in the decisions upon the 14th Amendment. [Citation.] When this

20 Thus, while this Court has acknowledged the power of Congress to deal with such diverse, yet substantial, topics as the bankruptcies of northeastern railroads, the registration of pesticides, and the Iranian hostage crisis, it has firmly expressed the view that the solution to such problems must conform to the just compensation clause. (*See Regional Rail Reorganization Act Cases*, 419 U.S. 102 [1974]; *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 [1984]; *Dames & Moore v. Regan*, 453 U.S. 654 [1981].)

California's "need" for recreational beach access can stand on no more compelling footing.

> seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.
>
> * * *
>
> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." (*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415-16 [1922]; emphasis added.)

Because of these actions of the California courts, government entities throughout California have been emboldened to bend their most creative efforts at imposing conditions only marginally related (if at all) to the use of property for which the owner seeks a permit. The fundamental relationship between these conditions and the proposed project is that the government wants the property, the money, or the service and the applicant is a vulnerable and available target, unable to offer more defense than the proverbial fish in a barrel.[21] Moreover, cases like the one at bench have told the entities that they will not be judicially restrained for their actions. Thus, exacting property or funds for (or provision of) the following items may now be the price for obtaining permission to use one's own property,

21 His only choices are to comply with the demand or not put his property to use. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 439, n. 17 (1982), this Court dismissed the non-use alternative as Constitutionally unacceptable.

For other decisions explicitly rejecting the imposition of exactions on a target of opportunity unrelated to the need sought to be fulfilled by government, *see, e.g., Arnett v. City of Mobile*, 449 So.2d 1222 (Ala. 1984); *Simpson v. City of North Platte*, 292 N.W.2d 297 (Neb. 1980); *West Park Ave., Inc. v. Township of Ocean*, 224 A.2d 1 (N.J. 1966).

even if the proposed use does not create the need for the exacted provision:

- child care (San Francisco);
- public art (San Francisco, Santa Monica, Los Angeles);
- "amenity space," including promenades, playgrounds, and jogging tracks (Los Angeles);
- low income housing (Monterey, Santa Monica, San Francisco, Santa Barbara);
- public transit (Los Angeles, San Francisco).[22]

If the harsh California rule is allowed to stand, it will free government agencies to coerce property or money for the public benefit from randomly chosen individuals as the price of a routine permit. Based on the facts stated in the opinion below, and the lip service paid the need for nexus, *any* exaction will be sustainable. If the facts of this case show "nexus," any facts will.[23]

---

[22] See San Francisco Downtown Plan (1985); San Francisco Office/Housing Production Program (1982); San Francisco Transit Impact Development Fee Ordinance (San Francisco Admin. Code §§38.1 et seq. [1981]); Los Angeles Preliminary Transit Corridor Specific Plan (1984); Monterey Ord. No. 2416 C.S. (1980); Santa Monica General Plan: Land Use and Circulation Elements (1984).

[23] The Coastal Commission has been so adamant and successful in demanding "donations" of access before the issuance of any permit, it has become the subject of "black humor" among the California bar. In a column in the Los Angeles Daily Journal (the daily legal newspaper with the largest circulation in California), the tongue-in-cheek suggestion was made that the Coastal Commission be given statewide (not just coastal) jurisdiction, in order to give the rest of California the "benefits" of the Coastal Commission's beach access policy:

> "Why not extend the Coastal Commission's authority all the way to the eastern edge of the state?
>
> "Consider the possibilities.
>
> "Say some homeowner in Barstow [a Mojave desert community more than 100 miles from the coast] wants to add a carport to his residence. The commission could step in and

(continued)

California has allowed its concern for effectuating broad governmental goals to swallow the Fifth Amendment's prohibition against confiscation of individual rights. (*Compare Kaiser Aetna v. United States,* 444 U.S. 164, 177 [1979]; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415-416 [1922].) If the right to use property is subject to governmental whim, then the right has disappeared. As this Court enduringly said more than a century ago:

> "It must be conceded that there are such rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and the property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true it is a despotism of the many, of the majority, if you choose to call it so, but it is none the less a despotism." (*Loan Ass'n v. Topeka,* [20 Wall.] 87 U.S. 655, 662 [1875])

This Court's assistance is urgently needed to reassert both balance and the primacy of the Constitution.

(ftn. continued)

require public dedication of an easement for a bicycle path to the ocean as a condition for building permission.

> "Soon the state would be criss-crossed with paths to the sea for the public to enjoy and everyone's fitness would be enhanced.
>
> "We can't allow selfish property owners to hamper public enjoyment of our natural resources." (Policzer, "From the Courts," Los Angeles Daily Journal, October 29, 1985, pt 2, p 1)

III. THE CONSTITUTION PROHIBITS MEETING LEGITIMATE GOVERNMENTAL OBJECTIVES BY SUBJECTING INDIVIDUAL CITIZENS TO UNCOMPENSATED PHYSICAL OCCUPATION OF THEIR PROPERTY

The California Court of Appeal suggests that the Legislature has recognized a problem, accepted the duty to solve it, and devised a solution. But the opinion proceeds as though recognition of a legitimate governmental *goal* legitimizes whatever *solution* is chosen.

That is not the law in the United States. Determination of a legitimate governmental objective is the first, not the last, step. The means chosen to achieve the objective must then be subjected to Constitutional scrutiny.

This case is an analytical twin of *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).[24] There, the Corps of Engineers sought to compel the owner of a private marina to open the marina for public use. This Court would not permit it:

> ". . . [T]he imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina . . . And even if the government physically invades only an easement in property, it must nonetheless pay just compensation. [Citations.]" (444 U.S. at 180)

The same is true here. The result of the Coastal Commission's action will be the physical invasion of the Nollans' lot by strangers. Such random, unwanted, and

---

[24] Commentators have noted the similarity between *Kaiser Aetna* and Coastal Commission easement exactions. (*See, e.g.*, Tabor, *The California Coastal Commission and Regulatory Takings*, 17 Pac. L. J. 863, 882-90 [1986]; Comment, *Public Access and the California Coastal Commission: A Question of Overreaching*, 21 Santa Clara Law. 395, 401-02, n. 26 [1981].)

unpredictable intrusions by unknown numbers of the general public is so significant that this Court concluded in *Kaiser Aetna:*

> ". . . we hold that the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." (444 U.S. at 180)

This Court has routinely noted that governmental actions resulting in actual physical invasion are relatively simple to analyze from the vantage point of the just compensation clause: physical invasion is a taking that cannot be accomplished without compensation. (*Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426-35 [1982]; *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 180 [1979]; *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 [1978]; *Griggs v. Allegheny County*, 369 U.S. 84, 88-89 [1962]; *United States v. Causby*, 328 U.S. 256, 261 [1946]; *Pumpelly v. Green Bay Co.*, 13 Wall. [80 U.S.] 166, 181 [1871]; *see* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 [1967]; Kratovil, *Eminent Domain Revisited and Some Land Use Problems*, 34 De Paul L. Rev. 587, 602 [1985].)

That it may be a valid goal of California to increase coastal access for the general public is not the only question involved. California is not writing on a clean slate, free to create a new world in its image, free of any constraints. The slate contains much writing on it already. Among the things written are that property may be privately owned and is Constitutionally protected. As this Court noted in *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229 (1984), states are free to engage in land reform, but when private property is taken in the process for use by others, compensation is mandatory.

There are thus two questions that must be addressed in this type of case:

- Is the governmental objective within the ambit of the police power?
- If so, does the proposed solution violate the Constitutional rights of some citizens?

No challenge is raised to the first issue. It can be conceded that the general goal of providing coastal access is legitimate. To legally achieve that goal by exaction, however, there must be a rational relationship between the applicant's action and the government's exaction for the exaction to satisfy the Constitution.

Regardless of the propriety of the governmental goal, the route to its solution must conform to the Constitution, not circumvent it. As this Court put it in *Watson v. Memphis*, 373 U.S. 526, 537 (1963):

> "[V]indication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them."

CONCLUSION

To assure the primacy of the Constitution, these *Amici* pray that the Court make it clear that exactions and compelled "dedications" imposed on individual property owners as conditions to make use of their property must bear a rational and fair relationship to the property owner's proposed action.

Respectfully submitted,

GUS BAUMAN
National Housing Center
15th & M Streets, N.W.
Washington, D.C. 20005
(202) 822-0359

JERROLD A. FADEM
MICHAEL M. BERGER*
of FADEM, BERGER & NORTON
A Professional Corporation
501 Santa Monica Boulevard
Post Office Box 2148
Santa Monica, CA 90406
(213) 451-9951

*Counsel of Record

AMICUS CURIAE

BRIEF

No. 86-133

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

v.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeals of the State of California, Second Appellate District

BRIEF OF THE BREEZY POINT COOPERATIVE, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

WALTER POZEN
(Counsel of Record)
JAY R. FIALKOFF
LINDA S. RIEFBERG
STROOCK & STROOCK & LAVAN
Seven Hanover Square
New York, New York 10004-2594
(212) 806-5400

Attorneys for Amicus Curiae Breezy Point Cooperative, Inc.

TABLE OF CONTENTS

	PAGE
Table of Authorities	III
Interest of Amicus Curiae	1
Summary of Argument	4
Argument	6
I. WHETHER GOVERNMENT ACTION AMOUNTS TO A "TAKING" WITHOUT JUST COMPENSATION IS AN INQUIRY SEPARATE FROM WHETHER THE GOVERNMENT'S ACTION IS PROPER AND AUTHORIZED	6
A. The California Court of Appeals Decision in Nollan Analyzed Only Whether the Government's Acts Were Authorized	7
B. An Exaction Which Is not Reasonably Related to a Need Created by a Project Is Unconstitutional as an Improper Exercise of Police Powers and Amounts to a "Taking"	9
C. Even a Valid Exercise of the State's Police Powers May Result in a "Taking" Under the Fifth Amendment	12
II. THE COMMISSION'S DEMAND FOR THE CONVEYANCE OF A DEED OF PUBLIC ACCESS TO THE STATE OF CALIFORNIA AS A CONDITION PRECEDENT TO THE APPROVAL OF A BUILDING PERMIT EFFECTS A "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS	15

PAGE

A. The Access Condition Required by the Coastal Commission Is a *Per Se* "Taking" 16

B. The Requirement of Dedication of an Easement Constitutes a "Taking" Even Under the "Balancing" Approach 21

III. THE ACCEPTED AND PROPER MECHANISM FOR CREATING PUBLIC ACCESS TO BEACHLANDS IS THROUGH THE POWER OF EMINENT DOMAIN 24

Conclusion 29

TABLE OF AUTHORITIES

PAGE

Cases:

Agins v. City of Tiburon, 447 U.S. 255 (1980) 13, 22
Aladdin Petroleum Corp. v. Gold Crown Properties, Inc., 221 Kan. 579, 561 P.2d 818 (1977) 19
Armstrong v. United States, 364 U.S. 40 (1960) 14, 29
Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) 9, 13

Berman v. Parker, 348 U.S. 26 (1954) 6

Danielson v. Sykes, 157 Cal. 686, 109 P. 97 (1910) 19

Frank Asuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) 10

Georgia-Pacific Corp. v. California Coastal Commission, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982) 13
Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) 13
Griggs v. Allegheny County, 369 U.S. 84 (1962) 22

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 16
Howard County v. JJM, Inc., 301 Md. 256, 482 A.2d 908 (1984) 10

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 18, 19, 22, 23

Liberty v. California Coastal Commission, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980) 10
Loretto v. Teleprompter Manhattan CATV Corp., 53 N.Y.2d 124, 440 N.Y.S.2d 843 (1981), *rev'd*, 458 U.S. 419 (1982) 16, 17, 18, 20, 22

Nebbia v. New York, 291 U.S. 502 (1934) 9
Nollan v. California Coastal Commission, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986) 7, 8, 11

PAGE

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 7, 13, 15, 16, 21
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 12, 13
Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327 (1922) 22
Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 18
Remmenga v. California Coastal Commission, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985) 13

Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) 9
Simpson v. City of North Platte, 206 Neb. 240, 292 N.W.2d 297 (1980) 10, 11

United States v. Causby, 328 U.S. 256 (1946) 22
United States v. General Motors Corp., 323 U.S. 373 (1945) 22
United States v. Riverside Bayview Homes Inc., 106 S. Ct. 455 (1985) 22
United States v. Willow River Power Co., 324 U.S. 499 (1945) 16
United States v. 3.66 Acres of Land, 426 F. Supp. 533 (N.D. Cal. 1977) 26
United States v. 101.80 Acres of Land, 716 F.2d 714 (9th Cir. 1983) 27

Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 9

Whalers' Village Club v. California Coastal Commission, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985) 8, 13

181 Inc. v. Salem County Planning Board, 133 N.J. Super. 350, 336 A.2d 501 (1975) 11

PAGE

Constitutions:

U.S. Const. amends. V, XIV 6
Cal. Const. art. 1, § 19 6
art. 10, § 4 8

Statutes:

Assateage Island National Seashore Act of 1965, 16 U.S.C. (1982)
§ 459f 26
§ 459f-1(d) 26

Canaveral National Seashore Act of 1975, 16 U.S.C. (1982)
§ 459j 26
§ 459j-2(a) 26

Cape Cod National Seashore Act of 1961, 16 U.S.C. (1982)
§ 459b-3(d) 26, 27

Chickasaw National Recreation Area Act of 1976, 16 U.S.C. (1982)
§ 460hh 26
§ 460hh-1(c) 26

Cuyahoga Valley National Recreation Area Act of 1974, 16 U.S.C. (1982)
§ 460ff-1(c) 27

Fire Island National Seashore Act of 1964, 16 U.S.C. (1982)
§ 459e 26
§ 459e-1(e) 26

Gateway National Recreation Area Act of 1972, 16 U.S.C. (1982)
§ 460cc 25
§ 460cc-1(a)(c)(1) 25

PAGE

Golden Gate National Recreation Area Act of 1972, 16 U.S.C. (1982)
§ 460bb 25

Gulf Islands National Seashore Act of 1971, 16 U.S.C. (1982)
§ 459h 26
§ 459h-1(c) 26

Hells Canyon National Recreation Area Act of 1975, 16 U.S.C. (1982)
§ 460gg-6(b) 27

Indiana Dunes National Lakeshore Act of 1976, 16 U.S.C. (1982)
§ 460u 25
§ 460u-3 26
§ 460u-15 27
§ 460u-18 25

Sleeping Bear Dunes National Lakeshore Act of 1982, 16 U.S.C. (1982)
§ 460x 26
§ 460x-10(b) 26
§ 460x-11(d)(2) 27

Whiskey-Shasta-Trinity National Recreation Area Act of 1965, 16 U.S.C. (1982)
§ 460q-1(a) 27

Wild & Scenic Rivers Act, 16 U.S.C. (1982)
§ 1271 27
§ 1274(a)(1) 27

Cal. Pub. Res. Code
§ 5006(a) (West 1984) 28
§ 30010 (West 1986) 8, 27, 28

Conn. Gen. Stat. Ann. (West 1971)
§ 23-8 28
§ 23-9 28

PAGE

Del. Code Ann. tit. 7 (1972)
§ 6810(a) 28

Fla. Stat. (1967)
§ 375.031 28

Haw. Rev. Stat.
§ 46-6.5 (1973) 28
§ 115-2 (1973) 28

Md. Nat. Res. Code Ann. (1977)
§ 5-1202 28

Mich. Comp. Laws Ann. (1970)
§ 318.5 28

N.Y. Parks Rec. & Hist. Preserv. Law (McKinney 1984)
§ 15.03 28

Other Authorities:

H. R. Rep. No. 1391, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Admin. News 4850 25

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165 (1967) 20

Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 J. of Urb. & Contemp. Law 269 (1983) 9

2A J. Sackman & R. Van Brunt, *Nichols' The Law of Eminent Domain* § 7.45[2][c] (3rd ed. 1985) 28

S. Rep. No. 428, 87th Cong., 1st Sess. *reprinted in* 1961 U.S. Code Cong. & Admin. News 2212 27

Tabor, *The California Coastal Commission and Regulatory Takings*, 17 Pac. L.J. 863 n.5 (1986) 8

No. 86-133

IN THE

Supreme Court of the United States

October Term, 1986

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeals of the State of California, Second Appellate District

BRIEF OF THE BREEZY POINT COOPERATIVE, INC. AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT

Interest of Amicus Curiae

The Breezy Point Cooperative is the creation of 2,835 individual homeowners banded together in a Cooperative Corporation which includes the communities of Roxbury, Rockaway Point and Breezy Point in Queens County, New York. These one family detached homes are located on the 500 acres of land and beachfront owned by the Cooperative. The Cooperative's land and beachfront, although privately owned, are located within the Breezy Point Unit of the

Gateway National Recreation area (Pub. L. No. 92-592) (1972), comprising lands and waters in the New York Harbor locale, "possessing outstanding natural and recreational features." The Breezy Point Unit encompasses the area between the eastern boundary of Jacob Riis Park and the westernmost point of Rockaway Peninsula, excepting the Breezy Point Cooperative. Pursuant to the Act, within the Breezy Point Unit, the Secretary of the Interior shall acquire an interest in the area to "assure the public use of and access to the entire beach." 16 U.S.C. § 460cc-1(c).

In 1979 the federal government attempted to condemn a portion of the Cooperative's beachfront for inclusion in the Gateway National Recreation Area. As a preliminary matter the Cooperative's title to the beachfront was tried and was confirmed to the low-water line. After this determination, the federal government abandoned its attempt to condemn the beach.

Recently, the Department of Buildings of the City of New York has objected to and, in some instances refused to issue building permits to the homeowners in the Cooperative for improvements to their homes. Discussions with the City of New York to resolve this situation have been halted because the City has requested that the Cooperative deed to the City a Scenic and Public Access Easement. Pursuant to the proposed deed the public would be permitted to traverse in the easement area from contiguous portions of Gateway National Recreation Area. The Cooperative would be required to maintain the easement area in perpetuity. The City claims such a deed is consistent with the New York State Waterfront Revitalization and Coastal Resources Act of 1981 and the United States Coastal Zone Management Act of 1972. The City contends that its policy is to promote maintenance and protection of the beaches, both privately and publicly, as well as public

access to the waterfront. The Cooperative has thus far refused to grant the deed to the city.

The Cooperative, therefore, has a vital interest in the legal issues that affect the power of state and local governments to obtain the surrender of private property rights without compensation as a condition for obtaining building permits.

The rule sought to be sustained in this Court by the California Coastal Commission is that confiscation of private property accomplished in the context of the issuance of a building permit is a permissible exercise of police power. Obviously, the implications of such a rule are not unique to California. There are thousands of property owners whose land abuts public parks, lands and beaches. These owners find themselves subject to increasing pressure by state, local and even federal authorities to obtain access to or across their lands to form a continuous park or beach for public use.

A decision by this Court upholding the authority of state and local governments to exact deeds from private property owners as a condition to obtaining building permits will serve to encourage the further violation of the Fifth and Fourteenth amendment rights of property owners and would repudiate long-standing constitutional principles.

Because of the Cooperative's deep concern about the outcome of this case and the implication of the decision upon the Cooperative's beachfront as well as its impact upon property owners throughout the United States whose land abuts public beach or park land, the Cooperative submits this brief to assist the Court in its resolution of the issues.[1]

1. Pursuant to Rule 36 of the Rules of this Court the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

Summary of Argument

In analyzing the issue of whether the California Coastal Commission ("Coastal Commission") may condition the granting of a building permit to a private beachfront homeowner upon the dedication of a public access easement, the California Court of Appeals held only that the Coastal Commission had the proper statutory authority and acted properly in exacting this condition. The error in the Court of Appeals' decision was both in the standard applied to evaluate the Coastal Commission's act and the failure to consider whether the condition imposed by the Coastal Commission was tantamount to a "taking."

The exaction of property as a condition to the granting of a building permit is an unconstitutional exercise of police powers where there is no reasonable causal connection between the building project and the exaction. Such unreasonable exercise of police powers amounts to a "taking" without just compensation. The distinction between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made and the needs created by such use.

In order to sustain the Coastal Commission's action, there must be a reasonable relationship or nexus between the Nollans' planned home renovation and the need for increased public access to the Nollans' beachfront; an "indirect" relationship is not enough. Accordingly, as the Nollans' planned home renovation created no increase in the need for public access to the beachlands, the condition cannot be justified as having been caused by the Nollans' development.

A government action, even a regulation under its police powers, may amount to a "taking" under the Fifth and Fourteenth Amendments. Thus, even if the access easement dedication is viewed as a proper exercise of the police powers, it may still be an unconstitutional "taking." If there is a permanent physical occupation, there is a "taking" *per se*. The Nollans were required to convey by deed to the State of California a lateral access easement over their beachfront property as a condition for obtaining a building permit to alter their existing home.[2] This is a permanent physical occupation of their property and the condition is invalid.

Even if the access easement dedication is not viewed as a permanent physical occupation, the Court must still balance several factors to determine whether the governmental action constitutes a "taking," i.e. the character of the government action; the economic impact on the property owner; and the extent the regulation has interfered with investment-backed expecations of the owner. In this case, the character of the government action weighs heavily in favor of finding a "taking." The access condition is a physical invasion by the government upon the owner's property, and impacts adversely on the use of the land and upon the investment made by the Nollans. The conveyance of an easement causes a daily physical invasion of the Nollans' property; the physical invasion absolutely dispossesses the Nollans of their right to exclude others from the property. Furthermore, the easement is qualitatively more severe than a regulation of the use of property, as the Nollans have no control over the timing or extent of the invasion.

The fact that the Nollans, individual property owners, are being asked to bear the full burden of increased public

2. The public easement would cover more than a third of the Nollans' entire lot. *See* Appellants' Brief Opposing Motion to Dismiss or Affirm at 7.

access to the beachlands also weighs in favor of finding a "taking." The Nollans' planned home renovation did not create any increased need for such public access. It is therefore unreasonable to condition the grant of a building permit upon the exaction of a portion of their property.

The proper and accepted means for creating increased public access to beachlands is by invoking the government's eminent domain powers. This mechanism has been repeatedly adopted by both state and federal governments. This Court should strike down the "back-door" approach to confiscation of private property which the Coastal Commission has implemented. The increase of public access to the beachlands, however laudable an aim, is a burden which should be borne by the California public, and not just the beachfront homeowners.

ARGUMENT

I

WHETHER GOVERNMENT ACTION AMOUNTS TO A "TAKING" WITHOUT JUST COMPENSATION IS AN INQUIRY SEPARATE FROM WHETHER THE GOVERNMENT'S ACTION IS PROPER AND AUTHORIZED

Under the Fifth Amendment, applicable to the States through the Fourteenth Amendment, private property may not be taken for public use, without just compensation.[3] U.S. Const. amends. V, XIV. The procedure which governments often use for taking private property for public use is a condemnation action, achieved through the power of eminent domain. *See Berman* v. *Parker*, 348 U.S. 26 (1954). Such an affirmative action by the government by

3. The California Constitution similarly provides that: "Private property may be taken or damaged for public use only when just compensation . . . has first been paid to . . . the owner." Cal. Const. art. I, § 19.

institution of formal condemnation proceedings is a well-recognized means to satisfy the constitutional mandate of the Fifth Amendment's "taking" clause.

Less clear, however, is when a government action which affects private property constitutes a "taking" absent commencement of condemnation proceedings.[4] This appeal presents the question of whether California may, consistent with the Fifth and Fourteenth Amendments, condition the granting of a building permit to renovate and upgrade an existing home upon the dedication of a public access easement over that owner's private beachfront property where there is no reasonable relationship between the planned improvement and an increased need for public access to the homeowner's beachfront.

A. The California Court of Appeals Decision in Nollan Analyzed Only Whether the Government's Acts Were Authorized.

The California Court of Appeals in *Nollan* v. *California Coastal Commission*, 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986) held that the Coastal Commission could condition the grant of a building permit to the Nollans upon the Nollans dedicating a lateral public access easement. The public access easement was to be in the form of a recorded "deed restriction"; thus, the Nollans in effect, were to burden their property with an irrevocable easement to the State.

The California Court of Appeals upheld the Commission's requirement as being supported by "substantial evidence" and disregarded the trial court's finding that the evidence before the Commission "did not support a finding

4. This Court has noted that the issue of what constitutes a "taking" has caused "considerable difficulty." *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978).

that the Nollans' project would create a 'direct or cumulative burden on public access to the sea.'" 177 Cal. App. 3d at 722-23, 223 Cal. Rptr. at 30, holding instead that only an "indirect relationship" must exist between the permit condition and "a need to which the project contributes." Having determined that the exaction of this easement was within the authority of the Coastal Commission[5] and that some "indirect" relationship existed between the Nollans' home renovation and the easement,[6] the court ended its review. Nowhere in its decision did the court even consider whether the Coastal Commission's requirement that the Nollans convey an easement by deed to California amounted to a "taking" of the Nollans' property without just compensation.

5. The Coastal Commission's authority derives from California's statutory program, the California Coastal Act of 1976, which was enacted to carry out the California constitutional mandate that "access to the navigable waters of [the] State shall be always attainable for the people thereof. Cal. Const. art. 10, § 4. *See also Whalers' Village Club* v. *California Coastal Commission*, 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985). Interestingly, the California Coastal Act includes a provision which expressly forbids any government act in furtherance of the California Coastal Act which would "take or damage private property for public use, without the payment of just compensation therefor." Cal. Pub. Res. Code § 30010 (West 1986). Despite this clear proscription against using the Coastal Act to "take" property, the California Coastal Commission has reportedly issued over 1,817 permits with access conditions. Tabor, *The California Coastal Commission and Regulatory Takings*, 17 Pac. L.J. 863, n.5 (1986) (citing to California Coastal Conservancy, Coastal Access Program Fifth Annual Report).

6. The Court of Appeals conceded that the Nollans' plans to reconstruct their summer home to a full-time residence did not create any greater need for public access to the tidelands. The "indirect relationship" which the court found to exist between the easement and the permit was that this "is a small project among many others which together limit public access to the tidelands and beaches . . ." 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 30.

B. An Exaction Which Is not Reasonably Related to a Need Created by a Project Is Unconstitutional as an Improper Exercise of Police Powers and Amounts to a "Taking."

The state may achieve a broad-range of regulatory purposes through the exercise of its police powers. However, any act of the state is unconstitutional if it is clearly arbitrary and unreasonable, having no substantial relation to public health, safety, morals, or the general welfare. *Village of Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 395 (1926). This ability of the state to act on behalf of the public interest, however, is limited by the Due Process Clause of the Fourteenth Amendment; a state's act must be reasonable, and have a real and substantial relation to the object being sought. *See Nebbia* v. *New York*, 291 U.S. 502 (1934).

The issue of the propriety of land dedication arises most often in challenges to statutes or ordinances affecting subdivision developers. In virtually all jurisdictions, however, the government's action is upheld only if the subdivision project has created the need for the exaction or dedication. *See* Pavelko, *Subdivision Exactions: A Review of Judicial Standards* 25 J. of Urb. & Contemp. Law 269 (1983).[7]

7. Pavelko identifies four different judicial tests of exaction which have emerged: (a) the privilege test, (b) the strict need test, (c) the specifically and uniquely attributable test and (d) the rational nexus test. Of these tests, only the so-called privilege test does not require a showing that the need for the exaction was created by the subdivision development. *See Ayres* v. *City Council of Los Angeles*, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949). This test, however, is no longer a predominant test of exaction validity. Pavelko, 25 J. of Urb. & Contemp. Law, at 283. All the other tests require a direct causal relationship between the burdens created by the development and the exaction requirement. The California test used in *Nollan* appears to most closely approximate this privilege test, although earlier California cases adopted the rational nexus test. *See Scrutton* v. *County of Sacramento*, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).

An exaction which is not reasonably related to a need created by a project is an improper exercise of police powers and amounts to a "taking." *See, e.g., Howard County* v. *JJM, Inc.*, 301 Md. 256, 482 A.2d 908 (1984) (requirement of reservation of right-of-way through subdivision for future highway had no nexus to subdivision plans); *Liberty* v. *California Coastal Commission*, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980) (condition for building permit that property owner dedicate property for free public parking until 5:00 p.m. daily was unrelated to development plans); *Frank Ansuini, Inc.* v. *City of Cranston*, 107 R.I. 63, 264 A.2d 910 (1970) (regulation requiring donation of at least 7% of subdivision land for recreational purposes was not based upon any need created by the project).

The distinction between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement imposed by the government has some reasonable relationship or nexus to the use to which the property is being made and the needs created by such use. It is inappropriate for the government to set a dedication or exaction requirement as an excuse for taking property when a landowner merely happens to be asking for some license, approval or permit from the government.

Simpson v. *City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) is strikingly similar to the case at bar. There, a city ordinance prohibited construction or improvements upon property unless the owners dedicated land for expansion of public streets. Plaintiffs were denied a building permit to construct a restaurant on their property because they had not dedicated a 40-foot right-of-way over their property for use in connecting two public highways in the future. The court held that the city's scheme was "land banking" and that since the plans for the use of this land were not caused by the plaintiff's building projects, it was unconstitutional "taking." The court in holding the

government's acts unreasonable noted that this ordinance could be applied so as to require a dedication of 40 feet of land simply if the plaintiffs had sought a building permit to add one foot on to their kitchen. 206 Neb. at 246, 292 N.W.2d at 301.

Similarly, in *181 Inc.* v. *Salem County Planning Board*, 133 N.J. Super. 350, 336 A.2d 501 (1975), a landowner was denied approval of a site plan for construction of a law office because the owner had refused to dedicate a portion of the land for use in future road widening. The court struck down the compulsory dedication requirement because there was no showing of a rational nexus between the landowner's building project and the need for the dedication. The court held:

> It must definitely appear that the proposed action by the developer will either forthwith or in the demonstraby immediate future so burden the abutting road, through increased traffic or otherwise, as to require its accelerated improvement. Such dedication must be for specific and presently contemplated immediate improvements—not for the purpose of 'banking' the land for use in a projected but unscheduled possible future use.

133 N.J. Super. at 359, 336 A.2d at 506.

Likewise, there is no rational nexus between the Nollans' home renovation plans and the need for increased public access. The only justification proffered by the Coastal Commission for the easement dedication requirement is akin to land banking—that all the small development projects on the beach will collectively create some future need for public access. 177 Cal. App. 3d at 723, 223 Cal. Rptr. at 30. Since the Nollans' plans did not, however, create any " 'direct or cumulative burden on public access to the sea,' " 177 Cal. App. 3d at 722-723, 223 Cal. Rptr. at 30

(quoting trial court), there is no reasonable relationship between the Coastal Commission's dedication requirement and the Nollans' building project. Merely by the act of applying for a building permit the Nollans were expected to give up property unrelated to the permit. Such an unreasonable exercise of police powers amounts to a "taking."

C. Even a Valid Exercise of the State's Police Powers May Result in a "Taking" Under the Fifth Amendment.

Even if the California court's test of the Nollans' dedication was the proper one—requiring only an "indirect" relationship to sustain the exercise of police powers—the Nollans were still entitled to a separate "takings" analysis. A government action which is an otherwise valid exercise of police powers may still be unconstitutional; there is a point when the police powers go "so far," that the government's act has become a "taking." *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393 (1922).

This Court in *Pennsylvania Coal Co.* v. *Mahon*, *supra*, made clear that the police powers are limited by the Fifth Amendment. Justice Holmes stated: "When [the exercise of police powers] reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." 260 U.S. at 413. Justice Holmes emphasized that the Fifth Amendment protection could not be qualified by the police powers because that would ultimately result in the demise of private property. In language equally applicable to the Coastal Commission's access condition, Holmes stated:

> We are in danger of forgetting that a strong public desire to improve the public condition is not enough

> to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.

260 U.S. at 416.[8]

While this Court has, subsequent to *Pennsylvania Coal*, often upheld the validity of land use regulations, it has consistently evaluated such regulations to see whether they had gone "too far" and were thus tantamount to "takings." *See, e.g., Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978) (landmark preservation law which affected how property owner could redevelop a building did not constitute a "taking"); *Agins* v. *City of Tiburon*, 447 U.S. 255 (1980) (residential zoning ordinance did not constitute a "taking"); *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590 (1962) (town ordinance, regulating dredging activities which caused appellants to abandon prior business, was not a "taking").

Under the California approach to this issue, it appears that so long as the regulatory program has some rational basis and serves some legitimate public purpose, there is no "taking." *See, e.g., Remmenga* v. *California Coastal Commission*, 163 Cal. App. 3d 623, 209 Cal. Rptr. 628 (1985); *Georgia-Pacific Corp.* v. *California Coastal Commission*, 132 Cal. App. 3d 678, 699, 183 Cal. Rptr. 395, 407-08 (1982). *Whalers' Village Club* v. *California Coastal Commission, supra; Ayres* v. *City Council of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

The problem inherent in this approach is that it completely confuses the "taking" question with the police

8. It cannot be disputed that the Coastal Commission's program of exacting access easements as conditions for the issuance of building permits to beachlot homeowners is a "short cut" to getting the public benefit of increased beach access, without paying for it. Not only is this short cut unconstitutional, but it is in contravention of the well-recognized use of the eminent domain mechanism to achieve the same ends of increased public access to the beachlands. *See infra* Point III.

powers consideration. A distinction must be made between improper exercises of police powers, direct physical takings of property, and excessive government regulation which merely affects the economic use of the property. Where the government appropriates private property for public use, it is not enough to analyze its validity as an exercise of police powers. If, for example, California's test were the proper one under a Fifth Amendment challenge, then *any* confiscation of property could be justified as merely an an exercise of state police powers. However, *Pennsylvania Coal* and its progeny teaches that more careful scrutiny is required to determine if there has been a "taking." Thus, in the land dedication situation, even where it is already determined that there is a proper exercise of police powers, a court must still evaluate the effects of the dedication requirement on the private property holder as to whether a "taking" has resulted. The reason to insist upon a separate "takings" analysis is to insure that the government not totally abandon the interests of the private property holder because of the public benefit involved. As recognized by this court in *Armstrong* v. *United States*, 364 U.S. 40 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

364 U.S. at 49.

The California Coastal Commission has conceded that the access condition imposed upon the Nollans is but a "part of a comprehensive program to provide continuous public access along Faria Beach as the lots undergo development or redevelopment." Report of California Coastal Commission, attached as Appendix E to Appellant's Jurisdictional Statement, at E-48. It is unconstitutional for the Commission, in furtherance of its goal to provide a "continuous public access along [the] beach," to force the private beachfront homeowners to solely shoulder the burden of achieving this public objective. The cost of achieving greater public access to beachlands now has become the responsibility of the private beachfront property owners, a small percentage of California's population. As stated by Justice Rehnquist: "[i]t is exactly this imposition of general costs on a few individuals at which the 'taking' protection is directed." *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. at 147 (Rehnquist, J., dissenting).

Moreover, California cannot avoid the fact of its Fifth Amendment violation simply by justifying the acquisition of these easements as a proper police power function. The Coastal Commission may argue that it is acquiring the access easements pursuant to a valid statutory program; however, if it chooses to do so, it must do so as an exercise of its eminent domain function through just compensation and not through this "back-door" policy of requiring dedication of property as a condition for the granting of a building permit.

II

THE COMMISSION'S DEMAND FOR THE CONVEYANCE OF A DEED OF PUBLIC ACCESS TO THE STATE OF CALIFORNIA AS A CONDITION PRECEDENT TO THE APPROVAL OF A BUILDING PERMIT EFFECTS A "TAKING" UNDER THE FIFTH AND FOURTEENTH AMENDMENTS

The issue of whether "justice and fairness" requires that action effecting private property be deemed a "taking," involves an *ad hoc* factual inquiry and "depends largely 'upon the particular circumstances [in that]

case.' '' *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. at 124 (citations omitted). While this Court has not established a single "set formula" for determining a "taking," *id.*, the Court has recognized certain standards which apply when resolving whether an action works a "taking." *See Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).[9]

In Loretto, the Court reviewed prior precedent to glean out general principles governing the Takings Clause question. The Court noted the distinction between government action which results in physical intrusion of private property and other government regulatory action which arises "from some public program adjusting the benefits and burdens of economic life to promote the common good." *Loretto*, 458 U.S. at 426, *citing Penn Central Transportation Co.* v. *New York City*, 438 U.S. at 124. The Court held that a "permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve." *Id.* This *per se* rule of "taking" is contrasted with a regulation that merely restricts the use of property or a temporary physical invasion, both of which remain subject to a balancing test to see if a taking has occurred. 438 U.S. at 131-32.

A. The Access Condition Required by the Coastal Commission Is a Per Se "Taking."

The public access easement which the Coastal Commission required the Nollans to convey in exchange for a building permit is a permanent physical occupation and thus,

9. In addition to the general inquiry of when a "taking" has resulted due to government action, any constitutional challenge under the Fifth and Fourteenth Amendments also must show there is "private property" interest at issue, *United States* v. *Willow River Power Co.*, 324 U.S. 499 (1945), and that the property has been taken for some "public use." *Hawaii Housing Authority* v. *Midkiff*, 467 U.S. 229 (1984). Neither of these requirements are at issue on this appeal.

is a *per se* taking under the Fifth and Fourteenth Amendments.

In *Loretto, supra*, New York State Executive Law § 828(1) provided that a landlord must permit a cable television company to install television cable upon the landlord's building. When the appellee cable company installed its cable on the appellant's building roof, pursuant to permission granted by the building's previous owners, the appellant sued the cable company, claiming the installation of the cable amounted to an unconstitutional "taking" without just compensation.

The New York Court of Appeals held that the statute authorizing the cable installation was a valid exercise of the state's police powers and not a "taking." The court considered the cable installation a proper government regulation and evaluated it by balancing the relevant factors. The fact that the cable installation resulted in a physical invasion to the property was considered only one of several relevant factors. The Court of Appeals found this invasion "minimal" and upheld the statute. *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 53 N.Y.2d 124, 145 (1981), *rev'd*, 458 U.S. 419 (1982).

This Court reversed, holding that the installation of the cable on appellant's roof was a "taking." This Court rejected the New York Court of Appeals' use of a balancing test, and its finding that the cable installation was a valid exercise of police powers. Instead, this Court noted that historically, the Court had always found a taking whenever a case involved a "permanent physical occupation" of real property. The *Loretto* Court found that this historical rule was justified by the character of the permanent physical occupation:

> Such an appropriation is perhaps the most serious form of invasion of an owner's property interests. To

> borrow a metaphor, *cf. Andrus* v. *Allard*, 444 U.S. 51, 65-66, 62 L. Ed.2d 210, 100 S. Ct. 318 (1979), the government does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand.

458 U.S. at 435. When the government permanently occupies property, according to the Court, it destroys the rights to possess, use and dispose of the property. The *Loretto* Court reasoned that the owner could no longer possess the occupied space or exclude others, the owner loses the power to control the use of the property, and the property loses much of its value since any transfer or sale will carry the same restraints on its use.

The Court in *Loretto* did note that not every physical invasion constituted a taking. The Court, citing *Pruneyard Shopping Center* v. *Robins*, 447 U.S. 74 (1980), *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) and the intermittent flooding cases, indicated that temporary limitations are subject to a more complex balancing process. "The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from his property." 458 U.S. at 435 n.12.

The Nollans' easement dedication was a *per se* "taking." The Coastal Commission required that the Nollans dedicate the public access easement as part of its title by having the deed acknowledging the easement recorded. As the condition required *conveyance* to the state of California, there can be no real dispute concerning the *permanence* of this physical occupation.

A conveyance by deed to the state, however, must as a matter of law constitiute a taking. Unlike the intermittent flooding cases and the occasional leafletting in a shopping center, in addition to the actual conveyance of a property

right to the state, the Nollans have been dispossessed of their right to exclusively use and exclude others from their property. The daily occupation of their beachfront by the public is a permanent physical occupation. The easement dedication means the Nollans will lose the "most treasured" property right—the right to exclude others. *Loretto*, 458 U.S. at 435. *See also Kaiser Aetna* v. *United States*, 444 U.S. at 179-180.[10] The Nollans must additionally give up any plans for use of their property which may conflict with the public's newly-created access route over their beachfront. The Nollans will no longer have any control over which or how many "strangers" can invade their property, or when such invasion may occur. More than a third of the Nollans' private beachfront lot will become nothing less than a permanent public way for which the Nollans will lose the right of exclusive possession, the ability to make use of their property as they choose, and the power to exclude. Additionally, the Nollans must now subject themselves to possible court actions by the Coastal Commission should they perform any work on their property or place anything on the beach which might be construed as an unreasonable interference with or obstruction of this public easement. *See Danielson* v. *Sykes*, 157 Cal. 686, 109 P. 87 (1910); *Aladdin Petroleum*

10 In *Kaiser Aetna* v. *United States*, this Court held that the federal government attempt to create a public right of access to an improved pond went beyond ordinary regulation or improvement for navigation so as to amount to a "taking." 444 U.S. at 178. The imposition of the navigational servitude by the federal government resulted in an actual physical invasion of the privately owned marina and interfered with the fundamental element of property ownership—the right to exclude. Although the Court in *Kaiser Aetna* held that the government's action did not rise to the level of a *per se* taking, the Coastal Commission's action in the instant case does. In *Kaiser Aetna* the federal government had merely attempted to create a recognized public right of access. The Coastal Commission, on the other hand, requires the property owner to *convey by deed* a public access easement. Having sought to take actual title to a portion of the Nollans' property, the Coastal Commission has effected a "taking."

Corp. v. *Gold Crown Properties, Inc.*, 221 Kan. 579, 561 P.2d 818 (1977).

The importance of the concept of physical invasion in the Takings Clause analysis has been best described as follows:

> At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur *only* through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. *The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership.*

Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) (emphasis added; footnotes omitted).

The easement which the Nollans are required to grant the State of California is a permanent physical occupation by the State and is therefore a *per se* taking. Accordingly, this Court need not evaluate any additional factors in order to declare unconstitutional the Coastal Commission's program of requiring a conveyance by deed of an access easement as a condition to the grant of a building permit.[11]

11. The fact that the easement condition came about only after the Nollans applied for a building permit should not be a factor to be considered under the *per se* takings test of *Loretto*. First, this Court in *Loretto* unequivocally stated "that a permanent physical occupation is a government action of such a unique character that it is a taking

(footnote continued on next page)

B. The Requirement of Dedication of an Easement Constitutes a "Taking" Even Under the "Balancing" Approach.

Even if the Court declines to apply the *Loretto per se* test for a "taking," "justice and fairness" mandate that the Coastal Commission's dedication condition be deemed a "taking" under the Fifth and Fourteenth Amendments. When the *per se* rule is not applied, a balancing of several factors should be undertaken to determine if the government action constitutes a "taking." *See Penn Central Transportation Co.* v. *City of New York*, 438 U.S. at 124. Some of the factors previously identified by this Court are: a) the character of the government action; b) the economic impact of the regulation on the property owner; and c) the extent the regulation has interfered with distinct investment-backed expectations. *Id.* Also significant is whether it is reasonable in a given situation to require a property holder to solely bear the burden created by a public benefit.

In this case, the character of the government action weighs heavily in favor of finding a "taking." There can be absolutely no disputing that the access condition is a physical invasion by the government upon the beachlot owner's property. This must be contrasted with govern-

without regard to other factors that a court might ordinarily examine." 458 U.S. at 432. Second, if the mere fact that the easement condition was imposed as *quid pro quo* for the building permit governed, this would simply invite governments to set up barriers for private property owners so that they need to seek governmental approval at every turn, and thus easily have similar conditions imposed. Finally, this Court in *Loretto* expressly rejected the analagous argument that the cable installation had to be considered as a condition for the landlord's privilege of renting his building: "a landlord's ability to rent his property may not be conditioned on his forfeiting the right to compensation for a physical occupation." 458 U.S. at 439 n.17. Similarly, the Nollans' right to make improvements upon their home should not be conditioned upon the forfeiture of a piece of their property or the right to compensation for such a forfeiture.

ment action which merely "adjusts" the benefits and burdens of economic life to promote the common good,"[12] as it is generally accepted that a "taking" is more readily found when the interference with property can be characterized as a physical invasion.

Numerous cases decided by this Court underscore that physical invasion upon property are likely to be viewed as "takings." *See, e.g., Kaiser Aetna* v. *United States, supra;* (claimed right-of-way easement involving navigable waters); *United States* v. *Causby,* 328 U.S. 256 (1946) (easement of flight over claimant's land); *Griggs* v. *Allegheny County,* 369 U.S. 84 (1962) (air easement over claimant's land); *United States* v. *General Motors Corp.,* 323 U.S. 373 (1945) (temporary use of warehouse by government); *Portsmouth Harbor Land & Hotel Co.* v. *United States,* 260 U.S. 327 (1922) (continuous firing of guns over land by government).

12. When a government regulation such as a zoning ordinance affects the use and economic value of private property, but is not a physical invasion of the property, it is subject to a less vigorous test for a "taking." A taking will be found if such a regulation does not substantially advance legitimate state interests or if it denies an owner economically viable use of his land. *See United States* v. *Riverside Bayview Homes, Inc.,* 106 S. Ct. 455 (1986); *Agins* v. *City of Tiburon,* 447 U.S. at 260. The Coastal Commission erroneously urges that this is the appropriate "takings" inquiry to apply to the Nollans' case. *See* Motion of Appellee to Dismiss or Affirm at 7. This suggestion is clearly erroneous for it fails to take into account that the regulatory program affecting the Nollans involved a physical intrusion upon their property. A distinction must be drawn between a direct public appropriation and a government regulation which results in a *de facto* taking. Both are unconstitutional if uncompensated; however, the *de facto* taking is a concept of the excessive use of police powers, and this is a separate inquiry from whether the government has acted by a direct physical invasion. *See Loretto* v. *Teleprompter Manhattan CATV Corp.,* 53 N.Y.2d 124, 161-163, 440 N.Y.S.2d 843, 862-64 (1981) (Cooke, J., dissenting) *rev'd,* 458 U.S. 419 (1982). If the Commission's test were the proper test in every takings challenge, then even the cable installation in *Loretto* and the right-of-way easement in *Kaiser Aetna, supra,* (discussed *infra* at p. 23) would be upheld.

In *Kaiser Aetna* v. *United States, supra,* Kaiser Aetna, private developers, created a marina subdivision by dredging and filling a privately owned pond in Hawaii. When the developers established the marina community, they connected the pond to a nearby public bay. Kaiser Aetna continued to control access into the marina from the bay, allowing primarily marina lessees and members to use the pond for a fee.

The United States claimed that since the pond had been developed and opened to the navigable waters that the public had a right to use this pond without payment of compensation to the owner. The Court held, however, that this would amount to a "taking" because the government's attempt to recognize a public right of access to the improved pond would result in an actual physical invasion of the privately owned marina and pond. 444 U.S. at 180. The Court noted the government could accomplish this purpose only by its eminent domain power. *Id.*

The Coastal Commission's access condition presents an even more compelling situation for finding a "taking" than in *Kaiser Aetna.* Although both situations involve the essential right to exclude the public, the Nollans are being told to give up this property right as a deed restriction, while the federal government in *Kaiser Aetna* did not exact any change in the marina's title—only that public access be allowed.

Furthermore, it is also significant that the Court found a "taking" in *Kaiser Aetna,* even though the marina's developers had initiated the development which created the pond's opening to navigable waters. This rebuts the suggestion that regulation is always proper when "triggered" by a private property owner's action. *See* Coastal Commission's Motion to Dismiss or Affirm at 8.

The fact that the Nollans, individual property owners, are being asked to bear the full burden of increased public

access to the beachlands also weighs in favor of finding a "taking." The Coastal Commission's exaction was not directly related to any need created by the Nollans' home renovation plans. At best, it was a plan of future land banking. It is unreasonable for the Coastal Commission to require the conveyance of land for the benefit of the general public, absent a sufficient nexus between the Nollans' development project and the access dedication. The Nollans' home improvement plans have no direct effect on the need for increased public access to the beach, since their plans will neither increase the influx of people to the beach nor interfere with some pre-existing access route. If increased public access to the beach is a laudable government objective, it should be shouldered by the public at large, rather than by a handful of property owners who happen to own beachfront property and desire to make home improvements. The individual property owners should not be obliged to give up their property for the public's benefit without getting justly compensated by the government.

III

THE ACCEPTED AND PROPER MECHANISM FOR CREATING PUBLIC ACCESS TO BEACHLANDS IS THROUGH THE POWER OF EMINENT DOMAIN

The program implemented by the California Coastal Commission which conditions the issuance of building permits upon the grant of a deed to California of an access easement is a "back-door" approach to increase public access to public beaches and create contiguous public beachlands. The proper and well-recognized means for creating such access and contiguous beachlands is not through such a "taking," but rather by the mechanism of eminent domain.

Congress has repeatedly passed legislation designed to authorize the purchase or condemnation of privately-owned beach property to create contiguous public beaches and to increase access to public beaches. By condoning the access condition imposed upon the Nollans, the Court will be sanctioning the acquisition of interests in private lands without fair and just compensation as provided for in the federal and state legislation for the creation of contiguous beach area and park lands.

The Gateway National Recreation Area Act of 1972, 16 U.S.C. § 460cc (1982) establishes a National Recreation Area along the New York, New Jersey shorelines. The legislation directs the Secretary of the Interior (the "Secretary") to acquire, by donation, purchase or exchange, "an adequate interest in the area to assure the public use of and access to the entire beach." 16 U.S.C. § 460cc-1 (a)(c)(1) (1982).

In the Indiana Dunes National Lakeshore Act of 1976, 16 U.S.C. § 460(u) (1982), the Secretary is directed to study the "desirability of acquisition of any or all of" certain specified areas from the standpoint of beach access and then "consider and propose options to guarantee public access to and use of the beach area." 16 U.S.C. § 460u-18 (1982).

Similarly, the Golden Gate National Recreation Area Act of 1972, 16 U.S.C. § 460bb (1982), also authorizes purchase or condemnation of beachfront land to secure beach access. Interestingly, in connection with that Act the House Interior and Insular Affiairs Committee noted that the purchase of the privately-owned beach property would be warranted only if such purchase would create contiguous beach running along the California oceanfront, and to do this the State and County lands on the oceanfront would have to be donated to the Federal government. H.R. Rep. No. 1391, 92nd Cong. 2d Sess. (Oct. 11, 1972) *reprinted in* 1972 U.S. Code Cong. & Admin. News 4850, 4858. Thus,

the clear legislative intent of this program was to use federal funds to create a contiguous public beach. *See also United States* v. *3.66 Acres of Land*, 426 F. Supp. 533 (N.D. Cal. 1977) (condemnation action to acquire portion of the privately owned land overlooking the Pacific Ocean as part of Golden Gate National Recreation Area).

Further, in a number of federal legislative programs which create National Recreation Areas and National Seashores, the Secretary is authorized to acquire "by purchase, gift, condemnation, the land, waters, and other property, and improvements thereon and any interests therein," within the boundaries described in the various Acts. *See, e.g.*, Cape Cod National Seashore Act of 1961, 16 U.S.C. § 459b-3(d) (1982); Fire Island National Seashore Act of 1964, 16 U.S.C. §§ 459e, 459e-1(e) (1982); Assateague Island National Seashore Act of 1965, 16 U.S.C. §§ 459f, 459f-1(d) (1965); Gulf Islands National Seashore Act of 1971, 16 U.S.C. §§ 459h, 459h-1(c) (1982); Canaveral National Seashore Act of 1975, 16 U.S.C. §§ 459j, 459j-2(a) (1982); Indiana Dunes National Lakeshore Act of 1976, 16 U.S.C. §§ 460u, 460u-3 (1982); Sleeping Bear Dunes National Lakeshore Act of 1982, 16 U.S.C. §§ 460x, 460x-10(b) (1982); Chickasaw National Recreation Area Act of 1976, 16 U.S.C. §§ 460hh, 460hh-1(c) (1982).

These acts all include a scheme which allows the owner of the property to elect to suspend the condemnation of the property for a specific time period. Importantly, however, Congress specifically excluded access ways to the beach from those properties where the Secretary's power of condemnation could be suspended. The Act provides that:

> the Secretary may exclude from the land so designated any beach or waters, together with so much of the land adjoining such beach or waters as to the Secretary may deem necessary for public access thereto.

16 U.S.C. § 459b-3(d) (1982) (Cape Cod National Seashore Act).[13] Thus, access to the beach can be immediately purchased or condemned by the government.

Congress has additionally authorized the Secretary of the Interior to acquire conservation, recreation and scenic easements from private landowners. *See, e.g.*, Sleeping Bear Dunes National Lakeshore Act of 1982, 16 U.S.C. § 460x-11(d)(2) (1982) (public access easements in lakeshore establishing Resource Preservation Area for educational and research purposes); Indiana Dunes National Lakeshore Act of 1976, 16 U.S.C. § 460u-15 (1982) (acquisition of interests to assure public access to banks of Little Calumet River); Whiskeytown-Shasta-Trinity National Recreation Area Act of 1965, 16 U.S.C. § 460q-1(a) (1982) (easements to assure public access to creek and to provide hiking and horseback trails); Cuyahoga Valley National Recreation Area Act of 1974, 16 U.S.C. § 460ff-1(c) (1982) (scenic easements); Hells Canyon National Recreation Area Act of 1975, 16 U.S.C. § 460gg-6(b) (1982) (scenic easements); Wild & Scenic Rivers Act, 16 U.S.C. §§ 1271, 1274(a)(1) (1982) (scenic easements). *See United States* v. *101.80 Acres of Land*, 716 F.2d 714, 716 (9th Cir. 1983).

Moreover, California has explicitly recognized that the proper method of securing public access to privately owned beaches is through legislation authorizing relevant public agencies or officials to acquire such property by purchase or condemnation.[14] *See* Cal. Pub. Res. Code § 30010 (West

---

13. While the legislation creating the Cape Cod National Seashore (and the other National Park legislation) specifically authorizes acquisition of property for park purposes by condemnation, such an authorizing provision is not necessary. As the legislative history to this Act provides, "Congress by the act of August 1, 1888, conferred general authority on any officer of the Federal Government authorized to acquire real estate for public uses to acquire it by condemnation." S. Rep. No. 428, 87th Cong., 1st Sess. (June 20, 1961), *reprinted in* 1961 U.S. Code Cong. & Admin. News 2212, 2232.

14. Numerous states also provide for acquisition or property for general recreation or conservation purposes without specifically men-

(footnote continued on next page)

1986); *See also,* Del. Code Ann. tit. 7, § 6810(a) (1972); Fla. Stat. § 375.031 (1967); Mich. Comp. Laws Ann. § 318.5 (West 1970); Haw. Rev. Stat. § 46-6.5 (1973), § 115-2 (1977).

The California Coastal Act provides for the acquisition by eminent domain of private beachfront property. Cal. Pub. Res. Code § 30010 (West 1986). In that Act, the California Legislature, in fact, acknowledges that when exercising the power to grant or deny a permit required for building along the state's coast, the relevant public commission or public body is not authorized to "take or damage private property for public use, without the payment of just compensation therefor." Cal. Pub. Res. Code § 30010 (West 1986).

Since 1933, the California Department of Parks and Recreation or a predecessor agency has acquired scenic easements over land in or immediately adjacent to state parks. 2A J. Sackman & R. Van Brunt, *Nichols' The Law of Eminent Domain,* § 7.45[2][c] p. 7-353 (3d ed. 1985). Scenic easement acquisitions have been carried out under a California statute which provides

> (a) The department, with the consent of the Department of Finance, and subject to Section 15853 of the Government Code, may acquire title to or interest in real and personal property which the department deems necessary or proper for the extension, improvement, or development of the state park system.

Cal. Pub. Res. Code § 5006(a) (West 1984). Section 15853 of the Government Code provides for acquisition of property by the State Public Works Board. Cal. Gov't Code § 15853 (West 1980).

tioning public access to beaches. *See, e.g.,* Conn. Gen. Stat. Ann. §§ 23-8, 23-9 (West 1971) (acquisition, by purchase or eminent domain, of open spaces for recreation); Md. Nat. Res. Code Ann. § 5-1202 (1977) (acquisition of property to preserve open spaces and recreational access easements); New York Park and Recreation Land Acquisition Bond Act, N.Y. Parks Rec. & Hist. Preserv. Law § 15.03 (McKinney 1984) (allocation of money to acquire private land for park and recreation uses).

Thus, the Federal government and California as well, have recognized that privately-owned beachfront property may be "taken" for public use—such as creating increased public access to the beaches—through purchase or condemnation. It is this method of government acquisition rather than the conditional approach practiced by the Coastal Commission which should be used to make public any part of our nation's coastline. Such acquisition programs guarantee that private persons not alone bear the public burden of the creation of public beach areas and public access thereto which "in all fairness and justice should be borne by the public as a whole." *Armstrong* v. *United States*, 364 U.S. at 49.

Conclusion

For the foregoing reasons, the Breezy Point Cooperative most respectfully urges this Court to reverse the decision of the California Court of Appeals.

Dated: December 19, 1986

Respectfully submitted,

WALTER POZEN
(Counsel of Record)
JAY R. FIALKOFF
LINDA S. RIEFBERG
STROOCK & STROOCK & LAVAN
Seven Hanover Square
New York, New York 10004-2594
(212) 806-5400

Attorneys for Amicus Curiae
*Breezy Point Cooperative, Inc.**

* ANDREW LACHOW, a recent law school graduate awaiting admission to the bar of the State of New York, assisted in the preparation of this brief.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN,
MARILYN HARVEY NOLLAN,
Appellants,

vs.

CALIFORNIA COASTAL COMMISSION,
Appellee.

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

BRIEF AMICUS CURIAE OF THE CALIFORNIA ASSOCIATION OF REALTORS® IN SUPPORT OF APPELLANTS

WILLIAM M. PFEIFFER, General Counsel
JUDITH K. HERZBERG, Counsel
California Association of Realtors ®
525 South Virgil Avenue
Los Angeles, California 90020
Telephone: (213) 739-8200
Counsel for Amicus Curiae

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITES CITED	ii
INTEREST OF AMICUS CURIAE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	7
THE COASTAL COMMISSION'S BEACH ACCESS AND USE CONDITIONS CONSTITUTE A "TAKING" WITHOUT JUST COMPENSATION PROHIBITED BY THE FIFTH AMENDMENT OF THE U.S CONSTITUTION.	
A. When the government, in exercising its police power, physically invades the property, a "taking" occurs	7
B. Assessments for public improvements to promote the general welfare must bear a reasonable relation to the benefits received or burdens created, or individual property owners are required to bear a disproportionate share of the public burden	16
CONCLUSION	29

TABLE OF AUTHORITIES CITED

Cases **Page**

Armstrong v. United States, 364 U.S. 40 (1960) 17

Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633 (1971) 21, 22

Georgia-Pacific Corp. v. California Coastal Commission, 166 Cal.App. 3d 148 (1985) 23

Grupe v. California Coastal Commission, 166 Cal.App. 3d 148 (1985) 21, 23

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 13, 14

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 11, 12, 13, 14

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 17

Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 8, 9, 11

TABLE OF AUTHORITIES (con't)

Cases **Page**

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 7, 8, 31, 32, 33

Pruneyard Shopping Center v. Robbins, 447 U.S. 74 (1980) 17

Remmenga v. California Coastal Commission, 163 Cal. App. 3d 623 (1985) 21

United States v. General Motors, 323 U.S. 373, 377-78 (1945) 11

Statutes

California Government Code
Section 65909 19
Section 66475.4(b) 19

California Public Resources Code
Section 30010 ..... 31, 32

TABLE OF AUTHORITIES
(con't)

Page

Constitution

United States Constitution
5th Amendment .. 7, 14, 16, 17, 30
14th Amendment 16

Other Authorities

Coastal Access Program Sixth Annual Report, A Joint Report of the California Coastal Commission and the State Coastal Conservancy (January, 1986) 27

IN THE
Supreme Court of the United States
OCTOBER TERM, 1986

JAMES PATRICK NOLLAN,
MARILYN HARVEY NOLLAN,
Appellants,

vs.

CALIFORNIA COASTAL COMMISSION,
Appellee.

ON APPEAL FROM
THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION SIX

INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 36, the California Association of Realtors® respectfully submits this brief amicus

curiae in support of Appellants, James Patrick Nollan and Marilyn Harvey Nollan.

Amicus curiae California Association of Realtors® (C.A.R.) is a voluntary trade association whose members consist of Boards of Realtors® in California and those persons licensed by the state of California as real estate brokers and salespersons who are members of local boards. C.A.R. is the largest state trade association in the United States and has over 180 affiliated Boards of Realtors® and over 115,000 members.

The mission of C.A.R. is to serve in developing and promoting programs and services that will enhance the members' freedom and ability to conduct their in-

dividual businesses sucessfully with integrity and competency. Moreover, C.A.R. serves to promote, through collective action, the preservation of real property rights.

C.A.R. members believe that every person should have the right to acquire real property with confidence and certainty that the value of such property will not be unduly diminished or jeopardized by governmental action at any level without just compensation.

The California rule that permits administrative agencies to take private property without compensation, to fulfill public needs not created by the property owner undermines the preservation of real

property rights and has far-reaching significance to the real estate industry engaged in the sale and development of real property.

Counsel for C.A.R. are familiar with the questions involved and the scope of their presentation and believe that further argument on the issues discussed by this amicus brief will be helpful to this Court.

SUMMARY OF THE ARGUMENT

This court is presented with the question of whether the cost associated with the State of California's desire to maximize public access to the California beaches must be borne by all of its tax-

payers or whether it instead can be imposed entirely upon the owners of the individual properties. The beach access and use condition is imposed by the Commission even though the Nollans wish only to remodel and enlarge a substandard beach house, an act which does not affect the existing public access to the beach.

The California rule holds that such conditions on improving a property are valid exercises of the police power and cannot constitute a taking if the dedication is reasonably related to the constitutionally declared public purpose, in this instance maximizing public access to the coastline. It is not necessary that consideration be given to whether a relationship exists between the actual im-

provement by the private property owner and the condition for approval.

This court has held that a "taking" analysis requires an evaluation of the character of the government action and the interference with investment-backed expectations. When the governmental action is a physical invasion of the property destroying the right of exclusive use of the property, a taking analysis is mandated by the U.S. Constitution. Further when a condition imposed on a property owner is unrelated to the activity of that property owner, the agency is forcing that private property owner to bear a disproportionate burden. Policy behind the Just Compensation Clause requires compensation.

ARGUMENT

THE COASTAL COMMISSION'S BEACH ACCESS AND USE CONDITIONS CONSTITUTE A "TAKING" WITHOUT JUST COMPENSATION PROHIBITED BY THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. When the government, in exercising its police power, physically invades the property, a "taking" occurs.

The Fifth Amendment to the United States Constitution protects against, among other things, the taking of private property for public use without just compensation. *"Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922) is the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking'." *Penn*

Central Transportation Co. v. City of New York, 438 U.S. 104, 127 (1978) quoting *Pennsylvania Coal* p. 415. This is particularly true when the character of the governmental action constitutes a physical taking of the property.

In *Penn Central* this Court reviewed the general principles governing the Takings Clause and noted that no "set formula" existed to determine in all cases if compensation is constitutionally due for a government restriction of property. The factual inquiries, according to the Court, are not standardless. The framework set forth in *Penn Central* has been used thereafter by this court as the analytical basis for approaching the problem of taking by regulation.

The Court acknowledges that in each case the line of demarcation between permissible regulation and unconstitutional taking must be decided on its own facts. The Court did identify the following factors as having particular significance *(Penn Central* at 123-128):

° the economic impact on the claimant and particularly the extent to which the regulation has interfered with distinct investment-backed expectations; i.e., interests that are sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes.

° the "character" of the government

action, ranging from physical invasion of property to a general regulatory program adjusting the benefits and burdens of economic life to promote the common good.

This court has long recognized that property is not just the physical land but rather a bundle of rights. Among the rights in this bundle are the right to use, possess, and exclude others.

The term "property" as used in the Constitution includes the entire bundle of rights attendant to an indivudal's ownership of a physical thing.

> ". . . [I]t denote[s] the group of rights inhering in the citi-

> zen's relation to the physical thing, as the right to possess, use, and dispose of it . . . The consitutional provision is addressed to every sort of interest the citizen may possess." *Penn Central*, J. Rehnquist dissenting, at 142 citing *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945) emphasis in original.

A regulatory appropriation of property is of such a serious nature that, ". . . the government does not simply take a single strand from the bundle of property rights: it chops through the bundle taking a slice of every strand." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982).

To the extent that the appropriation literally invades the physical property the following concomitant rights are

destroyed (*Loretto* at 435-438):

° the owner has no right to exclusively possess the occupied property nor to exclude others from possession and use of the space

° the permanent physical occupation of property forever denies the owner any power to control the use of the property

° Even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale the permanent occupation of that space by a stranger will ordinarily

empty the right of any value since the purchaser will also be unable to make use of the property.

In *Loretto* this court drew a sharp distinction between government's ability to regulate a landowner's use of his own land and government's ability to require a landowner to allow a third party to make use of his land. Citing *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) the court stated that an actual physical invasion is a government intrusion of an unusually serious character:

> ". . . [A]n owner suffers a special kind of injury when a stranger directly invades and occupies the owner's property . . . [P]roperty law has long protected an owner's expectation

that he will be relatively undisturbed at least in the possession of his property. To require, as well, that the owner permit another to exercise complete dominion literally adds insult to injury . . . . Furthermore, such an occupation is qualitatively more severe than a regulation of the use of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion." *Id.* at 436 emphasis in original.

Where there is such a permanent invasion, said the court, there is no need to weigh the extent the government has interfered with the landowner's reasonable investment-backed expectation because the "character" of the government action is a per se violation of the Fifth Amendment. *Loretto* at 437.

Coastal property owners are losing the above-described bundle of rights because the Commission requires them to convey to the public a permanent right of passage over and use at any time of the yards of their homes.

If this were other than coastal property it would be clear that the acquisition of the yard of a family home is a "taking." A declaration that open space should be maximized for public use would not de facto allow the appropriate governmental entity to acquire the backyards of family homes without compensation.

The fact that this is coastal property does not and should not alter the

"taking" analysis under the Fifth and Fourteenth Amendments. Such a declaration of public purpose merely supplies the justification for a "taking" of private property but the question of just compensation must still be entertained. The Commission is acquiring property for the public good at the expense of the Nollans and therefore a "taking" analysis must be applied to the facts of this case.

B. Assessments For Public Improvements To Promote The General Welfare Must Bear A Reasonable Relation To The Benefits Received Or Burdens Created Or Individual Property Owners Are Required To Bear A Disproportionate Share Of The Public Burden.

In determining whether a state law violates the policy behind the Takings

Clause, it is necessary to examine whether the acquisition of private property forces individual property owners to bear public burdens which, in all fairness and justice, should be borne by the public as a whole. *Pruneyard Shopping Center v. Robbins*, 447 U.S. 73 (1980), citing *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

> "The Fifth Amendment prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." *Pruneyard* at 74 fn. 7, quoting *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893).

The current law in California is

that the Coastal Commission can extract a dedication of public access to the beach without a showing that the requested change in use creates a need for additional public access. The dedication is based on the general public need for recreational facilities irrespective of the fact that the requested change in use of property has no effect on existing public access.

A reasonable nexus test has been codified by the California Legislature in situations involving dedications and subdivision approval. Local agencies are prohibited from conditioning the issuance of a building or use permit on dedication of land or public improvements not rea-

sonably related to the use of property for which the use permit is requested. *California Government Code* Section 65909,

> "No local governmental body, or any agency thereof, may condition the issuance of any building or use permit or zone variance on any or all of the following: (a) The dedication of land for any purpose not reasonably related to the use of the property for which the variance, building, or use permit is requested. . ."

A dedication requirement is excessive to the extent it is not reasonably necessary to meet public needs arising from the subdivision. *California Government Code* Section 66475.4(b):

> "A dedication requirement imposed as a condition of approval of a tentative map is invalid to the

extent to which it is determined by a court to be excessive. A dedication requirement is excessive to the extent it is not reasonably necessary to meet public needs arising as a result of the subdivision. If, at the time of imposition of the dedication requirement, a city, county, or city and county provides a mechanism for determining the amount of compensation for that portion of the dedication requirement which is excessive, and the manner of payment thereof, this section shall not apply."

Nothwithstanding this clear statement of intent the courts in California have disregarded the reasonable nexus test.

The necessity of a finding that a reasonable relationship exists between the proposed use and the burden created by the project has been redefined by

California courts so that the dedication of land need only be reasonably related to the goal of maximizing access. *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek,* 4 Cal. 3d 633 (1971); *Remmenga v. California Coastal Commission,* 163 Cal.App.3d 623 (1985); *Grupe v. California Coastal Commission,* 166 Cal.App.3d 148 (1985).

There is no requirement that the dedication imposed as a condition of the approval of a proposed use be rationally related to the benefits or burdens resulting from the proposed use.

In *Associated Home Builders* the California Supreme Court held that there

need be only an indirect relationship between the conditioned dedication and the public need.

> "A regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this, and the validity of the dedication requirement is not dependent on a factual showing that the development has created the need for it." *Id.* 638-640.

Subsequent cases expanded the holding of *Associated Home Builders* by applying that standard and finding it sufficient that the ". . . 'scope and extent' of the easements required by the Commission were 'reasonably related' to one of the principal objectives of the Coastal Act, which is to provide for maximum access to

the coast by all the people of this state." *Grupe* at 166 citing *Georgia Pacific Corp. v. California Coastal Commission,* 132 Cal.App. 3d 678, 699 (1982).

The obvious question is when, if ever, is acquiring beachfront property not reasonably related to maximizing public access? The answer -- rarely, if ever. What check exists then on the unrestrained zealous actions of a governmental entity desirous of maximizing the public good?

This current standard minimizes if not ignores any relationship the proposed use has on the conditional dedication of

property, and creates a situation in which the private property owner is required to bear a disproportionate burden in meeting the goal of maximizing public access to the coastline. Only by requiring that a reasonable relationship exist between the proposed use and the acquisition of property can this situation be remedied and brought back into the proscripts of the Constitution.

Without the existance of a reasonable nexus between the proposed use and the acquisition of property it is difficult for a purchaser of property or his Realtor® to accurately assess the true market value and its future potential. Additionally, for practical purposes a

cloud exists on title resulting from the unpredictability of ownership.

Under ideal conditions a purchaser of residential real property pays fair market value with the anticipation that at the very least it will not depreciate in value. Investment risks are identified and evaluated in determining the purchase price of the property. When discussing residential property in particular, it is important to note that development fees and dedications are generally premised on the theory that the developer can pass the costs on to future purchasers; the residential purchaser is not capable of doing so.

Although there is no guarantee that the property will never be taken, at least under the Constitution if the property is subsequently acquired by a governmental entity just compensation must be paid. This ensures that in furthering the public good the private property owner will not be required to bear a disproportionate share of cost.

Without the existance of a reasonable nexus the property owner is unable to reasonably ascertain what activity will trigger an acquisition of property. Take for example the situation where an individual purchases property for fair market value only to discover years later that a law has been enacted allowing the government to take, without compensation,

one-third of all private property for the public good with no conditions on the power to acquire that property. Without a reasonable nexus the result is the same as this unbridled police power: the owner of the property has lost the return on his investment and his property.

The Commission has issued 1,929 permits with access conditions since its inception. *Coastal Access Program Sixth Annual Report*, A Joint Report of the California Coastal Commission and the State Coastal Conservancy (January, 1986). In each instance, property owners were held ransom to the public desire to acquire public beach access irrespective of what change in use was proposed by the

property owner. The Commission has essentially ignored any discussion of public purchase of such access and has required its dedication as a condition of any improvement or building activity undertaken.

A condition requiring the dedication of property to maximize public beach access when the proposed change in use has no affect on the existing access is not reasonable. The purpose is not to mitigate the effect of the proposed use but merely to acquire property without compensating the property owner.

When an agency such as the Commission takes private property in such a

manner to fund the cost of social programs, it violates the U.S. Constitution because inter alia individual private property owners like the Nollans are required to bear a disproportionate share of the public burden.

CONCLUSION

The right to exclude others is one of the essential sticks in the bundle of property rights which underlie the Fifth Amendment guarantee against the taking of property without just compensation. There has literally been a taking of those rights to the extent that the California Supreme Court has interpretated the law to permit the California Coastal

Commission to extract, without compensation, a dedication from private property owners for public access to California beaches.

The courts in California have misapplied the reasonable nexus test intended by the Legislature so that it is no longer relevant. This misapplication goes beyond the limits of permitted regulation.

> "The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendancy of human nature is to extend the qualification more and more until at last private prop-

> erty disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 415 (1922) emphasis added.

When enacting the California Coastal Act the California Legislature, perhaps cognizant of this "natural tendancy of human nature," clearly reiterated the guarantee of compensation for a taking of private property:

> "The Legislature hereby finds and declares that this division is not intended, and shall not be construed as authorizing the regional commission . . . or local government acting pursuant to this division to exercise their power to grant or deny a

permit in a manner which will take or damage private proeprty for public use, without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or the United States." *California Public Resources Code* Section 30010, emphasis added.

Despite this clear and unequivocal statement the courts in California have allowed the Commission to take private property without compensation because it will benefit the public. The words of Justice Holmes in *Pennsylvania Coal* must not be forgotten:

> "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving

> the desire by a shorter cut than the constitutional way of paying for the change." *Id.* at 416 emphasis added.

C.A.R. urges that this Court find that a taking analysis is mandated by the Constitution and restore the reasonable nexus test to the State of California, as was intended by the California Legislature.

DATED: December 18, 1986.

Respectfully Submitted,

William M. Pfeiffer,
General Counsel
Judith K. Herzberg,
Counsel

By Judith K. Herzberg
Judith K. Herzberg, Counsel

Attorney for Amicus Curiae

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
DEC 19 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants,

V.

CALIFORNIA COASTAL COMMISSION,

Appellee.

On Appeal from the Court of Appeal of the
State of California, Second Appellate District

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

DAVID CRUMP
Professor of Law
South Texas College of Law

JEAN F. POWERS
Visiting Assistant Professor
of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Counsel of Record

TABLE OF CONTENTS

TABLE OF AUTHORITIES		ii
BRIEF OF AMICUS CURIAE		1
INTEREST OF AMICUS CURIAE		1
SUMMARY OF ARGUMENT		2
ARGUMENT		2
I.	THE COSTS OF BENEFITS TO SOCIETY AS A WHOLE SHOULD NOT BE BORNE BY ONLY A SMALL PART OF SOCIETY	2
II.	THE POLICY UNDERLYING THE JUST COMPENSATION REQUIREMENT OF LIMITING GOVERNMENTAL EXCESS WOULD BE SERVED BY APPLYING THE REQUIREMENT IN THIS CASE	4
III.	THE DECISION BELOW FAILS TO SERVE THE IMPORTANT PURPOSE OF HARMONIZING COMPETING SOCIAL NEEDS	6
IV.	THE DECISION BELOW DOES NOT COMPORT WITH THE POLICY IN FAVOR OF STABLE, PREDICTABLE PROPERTY VALUES	7
CONCLUSION		7

TABLE OF AUTHORITIES

CASES

Armstrong v. United States, 364 U.S. 40 (1960) 2
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 4, 7
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 3
Nollan v. California Coastal Commission, 223 Cal. Rptr. 28 (Cal. Ct. App. 1986) 4
Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 7
Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922) 3, 5
Vaughn v. Vermilion Corp., 444 U.S. 206 (1979) 4

SECONDARY AUTHORITIES

D. Hagman, *Outline of Presentation, The Compensation Issue: Theories of Liability for Damages from Planning and Land Use Controls*, ALI-ABA Program, Arlington, Virginia (March 26, 1980) 4, 6
Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RES. LAW 279 (1977) 6
Michelman, *Property, Utility, and Fairness: Commentaries on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165 (1967) 3
1 P. Nichols, *The Law of Eminent Domain* sec. 1.42 (Rev. 3d ed. 1985) 5
J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* 480 (2d ed. 1983) 5
L. Tribe, *American Constitutional Law* sec. 9-4, at 463 (1978) 2, 7

NO. 86-133

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,
Appellants,

V.

CALIFORNIA COASTAL COMMISSION,
Appellee.

BRIEF OF AMICUS CURIAE, THE LEGAL FOUNDATION OF AMERICA, URGING REVERSAL

INTEREST OF AMICUS CURIAE

The Legal Foundation of America ("LFA") is a nonprofit corporation supporting the operations of a public interest law firm as that term is defined in IRS regulations. LFA is located on the campus of the South Texas College of Law in Houston and shares certain personnel and activities with the law school. Its goals, among others, include the preservation of the market system of resource allocation, the attainment of a better balance between the federal government and the States, and the furtherance of individual political and economic liberties. In pursuit of its goals, LFA has appeared as amicus curiae in cases involving ownership of private property and the Fifth Amendment. All litigation undertaken by LFA is approved by its Board of Trustees, which consists of attorneys, businesspeople and academics.

SUMMARY OF ARGUMENT

Courts and commentators have identified several specific policy considerations underlying the just compensation clause. *First*, the compensation requirement achieves a just distribution of societal costs, in that it prevents the cost of benefits for one class of people or for society as a whole from being placed entirely upon another class of people. *Second*, the compensation requirement serves as a check (and sometimes the *only* check) upon government excess in taking private property for public use. Unless compensation is required, there may be virtually nothing to stop a state from imposing unlimited burdens upon a given element of society which is underrepresented in the electorate. *Third*, the compensation requirement increases the likelihood that lawmakers and regulators will consider the social costs and seek to harmonize the competing interests involved. *Finally*, the just compensation requirement insures that established systems of property ownership will not be arbitrarily disrupted by government action. Consideration of these policies in light of the facts of this case leads to the conclusion that the decision below results in an unconstitutional taking of Appellants' property without just compensation.

ARGUMENT

I. THE COSTS OF BENEFITS TO SOCIETY AS A WHOLE SHOULD NOT BE BORNE BY ONLY A SMALL PART OF SOCIETY.

While several specific policy considerations underlie the compensation-for-taking requirement, it is fundamentally and foremost "a limit on a government's power to isolate particular individuals for sacrifice to the general good." L. Tribe, *American Constitutional Law* sec. 9-4, at 463 (1978). This premise has been forcefully and unequivocally expressed by the Supreme Court of the United States in *Armstrong v. United States*, 364 U.S. 40 (1960):

> The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Id. at 49.

In *Armstrong*, the Court had to consider the question whether there was actually a taking involved, deciding that there was in that case. Here, the taking is clear, there being a "permanent physical occupation authorized by government." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). When such a physical occupation occurs, as here, compensation is required,[1] regardless of any finding that the "taking" may serve the public interest.

The real question is not whether the result desired is a beneficial one, but "upon whom the loss of the changes should fall." *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 416 (1922). In making such decisions, it is important to be constantly mindful of the "danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Id.*

---

1 As one author, discussing the compensation requirement, has put it:

> The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover. The one incontestable case for compensation . . . seems to occur when the government deliberately brings it about that its agents, or the public at large, "regularly" use, or "permanently" occupy, space . . . which theretofore was understood to be under private ownership.

Michelman, *Property, Utility, and Fairness: Commentaries on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967).

The only time property even arguably can be "taken" without compensation is in the situation in which the public's need for the property was, in fact, *created* by the one from whom the property is taken. This Court clearly recognized this principle in *Vaughn v. Vermilion Corp.*, 444 U.S. 206 (1979).[2] The lower court's ruling that "a direct burden on public access need not be demonstrated," *Nollan v. California Coastal Commission*, 223 Cal. Rptr. 28, 30 (Cal. Ct. App. 1986), is in direct conflict with this ruling.

II. THE POLICY UNDERLYING THE JUST COMPENSATION REQUIREMENT OF LIMITING GOVERNMENTAL EXCESS WOULD BE SERVED BY APPLYING THE REQUIREMENT IN THIS CASE.

One of the policies served by the just compensation requirement is that of preventing governmental excess by causing a governmental body or agency to consider the total societal costs of a proposed action. D. Hagman, *Outline of Presentation, The Compensation Issue: Theories of Liability for Damages from Planning and Land Use Controls*, ALI-ABA Program, Arlington, Virginia (March 26, 1980). If there is no need to pay for the property taken, the planner tends to focus on only the issues his perceptions cause him to be interested in, without the restraint of weighing the real costs imposed on other individuals and, indeed, on the society as a whole. As the United States Supreme Court has said in discussing the problems created when the right to compensation is qualified by the exercise of the police power,

2 In *Vaughn* a lessee of private property had constructed a series of man-made canals, which were connected to the navigable waterways. The Court nonetheless clearly held that *unless* it was shown that these waterways were created by the destruction or diversion of natural waterways, its decision in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979) would be controlling, and no public use would be allowed without just compensation. *Vaughn*, 444 U.S. at 208-209.

"the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States." *Pennsylvania Coal, supra*, at 415.

It is for this reason that the police power, at least to the extent it can be exercised without triggering the compensation requirement, is limited to the regulation of, and not the taking of, property,[3] and further, to regulation for the protection, as opposed to the general benefit, of the public.[4]

When the police power is not limited by the foregoing factors, or by a requirement of payment of just compensation, the prospect of taking private property for public use, albeit the use may be a most desirable one,[5] becomes dangerously attractive. The danger inherent in making the taking of private property overly attractive by not requiring compensation is eloquently expressed in the following passage:

> One may applaud the idea of a need for increased public recreational areas and still observe that the assertion of public need for private property under our Constitution is an

3 1 P. Nichols, *The Law of Eminent Domain* sec. 1.42 at 1-127 (Rev. 3d ed. 1985). While "police power" of the state in the broad sense may apply to the full range of governmental power, in the area of eminent domain and the compensation requirement, it is limited to the specific situations in which the government regulates the use of property without paying compensation, not to takings of property. J. Nowak, R. Rotunda, & J. Young, *Constitutional Law* 480 (2d ed. 1983).

4 Nichols, sec. 1.42 [2] at 1-158.

5 While the court below did not analyze the facts of this case to determine if a taking was involved, it did recite certain evidence as supporting the Commission's decision herein. Yet the evidence recited relates to the *need* for the property for public use, 223 Cal. Rptr. at 30, which does not answer the compensation question.

> assertion that the public should pay for what it wishes to take. Devices to take private property without compensation carry no guarantee that they will be restricted to tidelands, dry sand areas or the like. The appetite for taking private property for nothing could easily extend inland from tideland areas under the same claims of public need if that is recognized as a reason for taking without compensation.

Littman, *Tidelands: Trusts, Easements, Custom and Implied Dedication*, 10 NAT. RES. LAW 279, 295 (1977).

III. THE DECISION BELOW FAILS TO SERVE THE IMPORTANT PURPOSE OF HARMONIZING COMPETING SOCIAL NEEDS.

When monetary constraints are substantially removed from the decision to take private property, there is an increased likelihood that other social costs may also be overlooked. This concern also underlies the compensation requirement. *See generally* Hagman, *supra* at 2. For example, a regulatory taking may remove productive land from its best use; confusion as to the right to rely on one's ownership may make its best use improbable; and jobs, commerce and products may be lost because firms as well as individuals will fear that their interests are unprotected.

An obvious social cost of the California regulatory scheme in this case is that a requirement that property owners surrender a significant portion of their private property in order to get a building permit, tends to discourage new construction. This is certainly undesirable to the other property owners in an area, who would like to maintain a desirable living atmosphere, and, in fact, decreases the aesthetic appeal and even the safety of the general area to the public. This case is a clear example of this principle. The house which the Nollans replaced is described as a

> small bungalow . . . . Its deteriorated condition, small size, and shabby appearance made it an eyesore and a nuisance in an otherwise attractive neighborhood of newer, larger homes. The structure fell below many building, health and safety code standards . . . .

Appellants' Jurisdictional Statement at 5. The appellants herein did not, in fact, remove the structure described, and replace it with one more in keeping with the rest of the neighborhood until the trial court ruled in their favor in this case. *Id.*, n.1.

IV. THE DECISION BELOW DOES NOT COMPORT WITH THE POLICY IN FAVOR OF STABLE, PREDICTABLE PROPERTY VALUES.

Finally, the compensation requirement furthers the policy that a system of property ownership based upon generally understood values should not be subjected to "government disruption, at least without appropriate compensation." Tribe, *supra* at 456. When this policy is ignored, some person in the ownership chain must suffer loss, even if the loss is only reflective of the fear that an overreaching government may intervene at any point in the future to deprive property of its value. This risk, in turn, must be compensated for; it results in a deadweight loss to the members of the society generally, particularly when no principle, such as the compensation requirement, provides a check against it. *See generally, Kaiser Aetna, supra; Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

CONCLUSION

The decision of the California Court of Appeal should be reversed.

Respectfully submitted,

Jean F. Powers
Visiting Assistant Professor of Law
South Texas College of Law
1303 San Jacinto
Houston, Texas 77002
(713) 659-8040
Attorney for Amicus Curiae

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

In The
Supreme Court of the United States
October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, COAST ALLIANCE, AMIGOS DE BOLSA CHICA, COAAST, COMMITTEE FOR GREEN FOOTHILLS, CONCERNED CITIZENS TO SAVE OXNARD SHORES, LEAGUE FOR COASTAL PROTECTION, MARIN CONSERVATION LEAGUE, PLANNING AND CONSERVATION LEAGUE FOUNDATION, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., AND SURFRIDER FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLEE

Johanna H. Wald
Natural Resources
Defense Council
25 Kearny Street
San Francisco, CA 94108
(415) 421-6561

Fredric D. Woocher*
Center for Law in the
Public Interest
10951 W. Pico Blvd., 3rd Flr.
Los Angeles, CA 90064
(213) 470-3000

Attorneys for Amici Curiae

*Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Whether the California Coastal Commission's imposition of a permit condition that merely implements the public's existing right of access to the sea constitutes an unlawful taking under the Fifth and Fourteenth Amendments.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

INTEREST OF AMICI CURIAE 1

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 2

ARGUMENT

THE UNIQUE NATURE OF BEACHFRONT LAND AND THE PUBLIC'S HISTORICAL RIGHT OF ACCESS OVER THAT LAND PRECLUDE A FINDING OF A TAKING WHEN THE STATE DISCHARGES ITS PUBLIC TRUST OBLIGATIONS BY IMPOSING A PERMIT CONDITION PRESERVING PUBLIC ACCESS TO THE SHORE 4

A. There Can Be No Taking in This Case Because the Nollans' Bundle of Property Rights Does Not Include the Right to Exclude the Public From Access to the Tidelands 4

1. The property rights of an owner of beachfront land are determined by reference to state law 5

2. Private beachfront property in Calfornia is held subject to an easement for the public trust and other rights of public access to and along the shoreline 7

B. The Coastal Commission's Imposition of a Public Access Condition Merely Preserves Existing Public Rights of Access in Response to the Threat Posed to Those Rights by New Coastal Development 13

1. The permit condition implements the Coastal Commission's constitutional and statutory obligation to preserve public access to and along the coast 14

TABLE OF CONTENTS—Continued

Page

2. The permit condition responds directly to the need for public access to which new coastal development contributes 16

C. Prior Judicial Decisions Refute the Nollans' Claim That a Public Access Dedication Condition Constitutes a Taking Requiring Just Compensation ... 19

1. The courts have consistently upheld government action taken to implement overriding public trust rights, even at the expense of upland landowners' private property interests ... 19

2. The courts have consistently held that no taking occurs where a public access dedication is required as a condition of permit approval 23

CONCLUSION 29

APPENDIX A-1

TABLE OF AUTHORITIES

Page

CASES

Agins v. City of Tiburon, 447 U.S. 255 (1980) 25

Andrus v. Allard, 444 U.S. 51 (1979) 23

Arnold v. Mundy, 6 N.J.L. 1 (1821) 8

Associated Home Builders v. City of Walnut Creek, 4 Cal.3d 633, 484 P.2d 606, *appeal dismissed*, 404 U.S. 878 (1971) 24

Barney v. Keokuk, 94 U.S. 324 (1876) 9

Bishop v. Wood, 426 U.S. 341 (1976) 6

Board of Regents v. Roth, 408 U.S. 564 (1972) 5

Borax, Consolidated Ltd. v. City of Los Angeles, 296 U.S. 10 (1935) 4

City of Berkeley v. Superior Court, 26 Cal.3d 515, 606 P.2d 362 (1980) 4, 7, 10, 13, 18

City of Daytona Beach v. Tona-Rama, Inc., 271 So.2d 765 (Fla. Dist. Ct. App. 1972) 12

Colberg, Inc. v. State of California ex rel. Dep't of Pub. Works, 67 Cal.2d 408, 432 P.2d 3 (1967), *cert. denied*, 390 U.S. 949 (1968) 20

County of Los Angeles v. Berk, 26 Cal.3d 201, 605 P.2d 381 (1980) 7

Dietz v. King, 2 Cal.3d 29, 465 P.2d 50 (1970) 12

Eldridge v. Cowell, 4 Cal. 80 (1854) 9

Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal.App.3d 678, 183 Cal.Rptr. 395 (1982) 24

Gion v. City of Santa Cruz, 2 Cal.3d 29, 465 P.2d 50 (1970) 7, 12

Grupe v. California Coastal Comm'n, 166 Cal. App.3d 148, 212 Cal.Rptr. 578 (1985) 19, 20, 24, 26

TABLE OF AUTHORITIES—Continued

Page

CASES—Continued

Henry Dalton & Sons Co. v. Oakland, 168 Cal. 463, 143 P. 721 (1914) 20

Hughes v. Washington, 389 U.S. 290 (1967) 5, 6

Illinois Central R.R. Co. v. Illinois, 146 U.S. 387 (1892) 9, 16

In re Application of Ashford, 50 Hawaii 314, 440 P.2d 76 (1968) 12

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 6, 22, 23, 27

Kern River Public Access Ctte. v. City of Bakersfield, 170 Cal.App.3d 1205, 217 Cal.Rptr. 125 (1985) 14

Liberty v. California Coastal Comm'n, 113 Cal. App.3d 491, 170 Cal.Rptr. 247 (1980) 24

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 18

Marks v. Whitney, 6 Cal.3d 251, 491 P.2d 374 (1971) 10

Martin v. Wadell, 41 U.S. (16 Pet.) 367 (1842) 9

Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 471 A.2d 355, *cert. denied*, — U.S. —, 105 S.Ct. 93 (1984) 8, 15

Miramar Co. v. City of Santa Barbara, 23 Cal.2d 170, 143 P.2d 1 (1943) 19, 20

National Audubon Society v. Superior Court, 33 Cal.3d 419, 658 P.2d 709 (1983) 8, 11, 19

Pacific Legal Foundation v. California Coastal Comm'n, 33 Cal.3d 158, 655 P.2d 306 (1982) 14

Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) 21, 26

TABLE OF AUTHORITIES—Continued

Page

CASES—Continued

People v. California Fish Co., 166 Cal. 576, 138 P. 79 (1913) 10

People v. Southern Pacific R.R. Co., 166 Cal. 627, 138 P. 103 (1913) 20

Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) 6, 18

Remmenga v. California Coastal Comm'n, 163 Cal.App.3d 623, *appeal dismissed*, — U.S. —, 106 S.Ct. 241 (1985) 24

Roberts v. United States Jaycees, 468 U.S. 609 (1984) 6

Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) 5, 25, 26, 27

Scranton v. Wheeler, 179 U.S. 141 (1900) 21, 22

Sea Ranch Ass'n v. California Coastal Comm'n, 527 F.Supp. 390 (N.D. Cal.), *vacated as moot*, 454 U.S. 1070 (1981) 24

Seaway Co. v. Attorney General, 375 S.W.2d 923 (Tex. Civ. App. 1964) 12

Shively v. Bowlby, 152 U.S. 1 (1894) 8, 9

St. Louis v. Western Union Telegraph Co., 148 U.S. 92 (1893) 18

State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969) 12

State v. Superior Court (Lyon), 29 Cal.3d 210, 625 P.2d 239, *cert. denied*, 454 U.S. 865 (1981) 11

United States v. Chandler-Dunbar Water Power Co., 229 U.S. 53 (1913) 21

United States v. Chicago, Milwaukee, St. Paul & Pacific R., 312 U.S. 592 (1941) 21

TABLE OF AUTHORITIES—Continued

Page

CASES—Continued

United States v. Cress, 243 U.S. 316 (1917) 6

United States v. General Motors Corp., 323 U.S. 373 (1945) 5

United States v. Kansas City Life Ins. Co., 339 U.S. 799 (1950) 21

United States v. Rands, 389 U.S. 121 (1967) 21, 22

United States v. Riverside Bayview Homes, Inc., — U.S. —, 106 S.Ct. 455 (1985) 25

United States v. Willow River Power Co., 324 U.S. 499 (1945) 6, 7, 21

Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980) 5

Whaler's Village Club v. California Coastal Comm'n, 173 Cal.App.3d 240, 220 Cal.Rptr. 2 (1985) 18, 24

CONSTITUTIONS

United States Constitution

Fifth Amendment 2, 3, 4, 21, 22, 25

Fourteenth Amendment 2, 4

California Constitution

Article X, section 4 ..... 12, 14, 15

STATUTES

California Government Code

§ 66478.4 14

§ 66478.5 14

§ 66478.11 14

California Public Resources Code

§ 30001.5(c) 14

TABLE OF AUTHORITIES—Continued

	Page
STATUTES--Continued	
§§ 30210-30214	14
§ 30211	16
§ 30212	14
§ 30214(b)	17
LAW REVIEWS	
Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights*, 28 U.C.L.A. L. Rev. 1049 (1981)	8
Note, *Public Trust Doctrine—Beach Access—The Public's Right to Cross and to Use Privately Owned Upper Beach Areas*, 15 Seton Hall L. Rev. 344 (1985)	8
Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970)	8
Note, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C. L. Rev. 159 (1985)	8
Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473 (1970)	8
Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C. Davis L. Rev. 195 (1980)	8
MISCELLANEOUS	
H. Althaus, *Public Trust Rights* (1978)	8
The Institutes of Justinian (1870)	8
Rules of the Supreme Court, Rule 36	2

No. 86-133

In The

Supreme Court of the United States

October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the
State of California, Second Appellate District

BRIEF OF NATURAL RESOURCES DEFENSE COUNCIL, SIERRA CLUB, COAST ALLIANCE, AMIGOS DE BOLSA CHICA, COAAST, COMMITTEE FOR GREEN FOOTHILLS, CONCERNED CITIZENS TO SAVE OXNARD SHORES, LEAGUE FOR COASTAL PROTECTION, MARIN CONSERVATION LEAGUE, PLANNING AND CONSERVATION LEAGUE FOUNDATION, SCENIC SHORELINE PRESERVATION CONFERENCE, INC., AND SURFRIDER FOUNDATION AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF AMICI CURIAE

Amici are national, state, and regional environmental and conservation organizations who share a common interest in protecting, restoring, and enhancing coastal resources and in preserving public access to those resources. Consistent with this objective, all of the amici have been actively involved in efforts to ensure public access to the coast and to secure adequate control over development in the coastal zone. Amici are seriously concerned about the implications for government regulatory actions to protect these interests if the decision below is not sustained by this Court. A more detailed statement of the interest of each amicus appears in the Appendix to this brief.

Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case set forth by appellee, California Coastal Commission.

SUMMARY OF ARGUMENT

There are two fundamental flaws in the Nollans' claim that the Coastal Commission's imposition of a permit condition requiring them to acknowledge a public right of access along the shore constitutes an unlawful taking under the Fifth and Fourteenth Amendments. First, the Nollans' argument is premised on the mistaken assumption that their bundle of property rights includes the right to exclude the public from access to the ocean across the shoreland portion of their lot. Second, the Nollans fail to recognize that a public access exaction imposed as a condition for permit approval calls for a very different takings analysis than might be appropriate if the same exaction were unilaterally imposed by the government in an effort to acquire privately owned resources for its own use.

With respect to the first point, the truth is that the Nollans' property interest does not include, and never has included, the right to exclude the public from access to the tidelands across their beach. Under California law—which defines the scope of the Nollans' property rights in the first instance—the owners of beachfront land take title to their property subject to an overriding public right to use the state-owned tidal lands and waters for purposes such as navigation, commerce, fishing, bathing, and recreation. This common-law public trust doctrine, which has specifically been incorporated into the state Constitution, imposes a limited public easement over coastal lands that safeguards

the public's right of access to the shore against any competing claims by beachfront property owners like the Nollans of the right to preclude such access. In requiring the Nollans to record the deed restriction challenged in this case, the Coastal Commission sought merely to discharge its public trust obligation to preserve the public's historical right of access across their beach. Since the Nollans never possessed the right to exclude the public from the shore in the first place—and indeed the public has been exercising its lateral access rights across the Nollans' beach for years—no property has conceivably been taken by the Commission's action.

As to the second basic defect in the Nollans' argument, their takings claim completely disregards the context in which the public access dedication requirement has been imposed. Unlike the situation in the cases upon which the Nollans rely, the state here has not initiated any action to displace the Nollans or to appropriate their property for its own use. Rather, it is the Nollans who have requested something from the Coastal Commission—permission to proceed with new development in the coastal zone—and the Commission has simply responded by conditioning its approval on the Nollans' agreement to comply with a restriction that is necessary to protect the interests of the general welfare. As this Court has recognized, it "can hardly be called a taking" to require a property owner to comply with conditions that are rationally related to a legitimate government interest; only when the effect of those conditions is to prevent "economically viable" use of the land in question can it be said that a taking has occurred. Thus neither the language of the Fifth Amendment nor any of this Court's decisions remotely suggest that the public access condition imposed in this case can be considered a taking. The California Court of Appeal was plainly correct in so holding, and the decision below must be affirmed.

ARGUMENT

THE UNIQUE NATURE OF BEACHFRONT LAND AND THE PUBLIC'S HISTORICAL RIGHT OF ACCESS OVER THAT LAND PRECLUDE A FINDING OF A TAKING WHEN THE STATE DISCHARGES ITS PUBLIC TRUST OBLIGATIONS BY IMPOSING A PERMIT CONDITION PRESERVING PUBLIC ACCESS TO THE SHORE.

A. There Can Be No Taking in This Case Because the Nollans' Bundle of Property Rights Does Not Include the Right to Exclude the Public From Access to the Tidelands.

The Fifth Amendment, made applicable to the states by the Fourteenth Amendment, proscribes the taking of "private property" for public use without just compensation. This case challenges as an unconstitutional taking the California Coastal Commission's policy of conditioning new development along the coastline on the landowner's agreement to acknowledge a public right of access to the tidelands.[1] Underlying appellants' takings claim is the unstated assertion that their ownership in fee of a lot fronting the ocean entitles them to both the exclusive possession and the exclusive use of the beachfront portion of that parcel. Consequently, the Nollans contend, a permit condition that interferes with their exclusive use of the beachfront land constitutes a taking of one of their essential property interests—the right to exclude others.

[1]As used throughout this brief, "tidelands" refers to the lands between the mean low-tide and mean high-tide lines, which are covered and uncovered successively by the tidal ebb and flow. As explained below, this area—which is also referred to as the "wet-sand beach" or "foreshore"—is generally owned by the state. *See Borax, Consolidated Ltd. v. City of Los Angeles*, 296 U.S. 10, 15 (1935); *City of Berkeley v. Superior Court*, 26 Cal.3d 515, 518 n.1, 606 P.2d 362, 363 n.1 (1980). The land seaward of the mean low-tide line (and thus always covered by water) is "submerged land." The stretch of beach landward of the mean high-tide line, but below the line of vegetation or dune line, is called "dry-sand beach." In some locations, such as the Nollans' property, a seawall may have been constructed to prevent further landward extension of the beach through wave action. The "dry-sand beach" area is periodically covered by water, and it is the public's right to pass and re-pass along a strip of this beach that is at issue in this case. Finally, the area above and landward of the vegetation line is referred to as "upland."

The premise of appellants' argument is fundamentally flawed, however, for in California—as in many other coastal states—the owners of beachfront property do not possess an exclusive right of use of the shoreline fronting the ocean. Rather, they take title to that land subject to the public's historical rights of access to the tidelands—inalienable rights which the State is duty-bound to protect. Accordingly, the Coastal Commission's decision to condition the issuance of a coastal development permit on the Nollans' agreement not to interfere with the public's right of access along the shore did not, and could not, constitute a taking of their property.

1. The property rights of an owner of beachfront land are determined by reference to state law.

The term "property" as used in the Takings Clause denotes "the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it." *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945). This Court has frequently observed, however, that "[p]roperty interests . . . are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). *Accord Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

It is well-settled that the scope of property rights, including the bundle of interests in real property, are defined in the first instance by state law. As Justice Stewart noted in *Hughes v. Washington*, 389 U.S. 290, 295 (1967) (Stewart, J., concurring), "Surely it must be conceded as a general proposition that the law of real property is, under our Constitution, left to the individual

states to develop and administer." The sufficiency of a claimed property interest must therefore be decided by reference to state law. *See generally Bishop v. Wood,* 426 U.S. 341, 344 (1976).

The state's authority to determine the extent of the Nollans' property rights in this case is reinforced by two particular aspects of the instant dispute. First, appellants' property is located on the shore of state-owned tidelands. This Court has long recognized that shoreline property, such as that abutting lakes, rivers, and the ocean, involves special considerations owing to the important public interest in those waters, and when called upon to resolve competing claims to property rights in such land, the Court has done so by reference to state law. *See, e.g., United States v. Cress,* 243 U.S. 316, 330 (1917) (determining riparian rights of landowner of non-navigable stream under Kentucky law); *United States v. Willow River Power Co.,* 324 U.S. 499, 503 (1945) (rights of owner of land riparian to navigable stream decided under law of Wisconsin); *Kaiser Aetna v. United States,* 444 U.S. 164, 166, 179 (1979) (reference to Hawaiian law in determining property interest of owners of privately created marina). *See also Hughes v. Washington,* 389 U.S. at 295 (Stewart, J., concurring) (state law governs property rights of riparian owners, and state legislatures and judiciaries are free to make changes in general rules of real property law).

Second, as is discussed below, this case involves the creation of a limited easement for access onto and across private property in order to implement the guarantees of the state Constitution. In *Pruneyard Shopping Center v. Robins,* 447 U.S. 74, 84 (1980), the Court expressly confirmed the State's power to create such rights of public access under its "residual authority . . . to define 'property' in the first instance." *Accord Roberts v. United States Jaycees,* 468 U.S. 609, 625 (1984) ("A State enjoys broad authority to create rights of public access on behalf of its citizens.").

Thus, in analyzing whether any cognizable property right has been taken by the Coastal Commission's permit condition in this case, the Court must first look to California law to determine the precise scope of the Nollans' interest in their property. As was noted in *Willow River Power Co.,* 324 U.S. at 502-03: "We cannot start the process of decision by calling such a claim as we have here a 'property right'; whether it is a property right is really the question to be answered." And, under California law, it is clear that the Nollans do not have a property right to exclude the public from access to and along the shoreline portion of their lot.

2. Private beachfront property in California is held subject to an easement for the public trust and other rights of public access to and along the shoreline.

California real property law incorporates a number of doctrines recognizing the unique nature and value of the state's coastal resources, thereby subjecting shorelands to different legal principles than might otherwise govern upland property. In particular, special rules have developed that evince "a clearly enunciated public policy in this state in favor of allowing public access to shoreline areas." *County of Los Angeles v. Berk,* 26 Cal.3d 201, 222, 605 P.2d 381, 395 (1980); *accord Gion v. City of Santa Cruz,* 2 Cal. 3d 29, 42-43, 465 P.2d 50, 58-59 (1970). These common-law doctrines, together with their constitutional and statutory implementations, negate the Nollans' claim that they have the right to exclude the public from access to and along the beach portion of their property.

The most significant of the special common-law rules governing beachfront property in California are embodied in the public trust doctrine, whch recognizes that the public owns the right to use the tidelands for purposes such as navigation, commerce, fishing, bathing, and recreation, and which holds that the rights of the public for these purposes prevail over the rights of private persons claiming title to such property. *See generally City of Berkeley v.*

Superior Court, 26 Cal.3d 515, 521, 606 P.2d 362, 365 (1980).[2] The public trust doctrine dates back some two thousand years to Roman law, which recognized no private ownership of the seas and the seashore: "By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea."[3] The English common law likewise held that the public possessed important rights in the tidelands that superseded any conflicting rights claimed by private parties.[4] After the American Revolution, the rights of the

[2]The history and application of the public trust doctrine, both in California and throughout the country, is recounted in any number of law review articles. Some of the more helpful discussions may be found in: H. Althaus, *Public Trust Rights* (1978); Comment, *Public Beach Access Exactions: Extending the Public Trust Doctrine to Vindicate Public Rights,* 28 U.C.L.A. L. Rev. 1049, 1069-75 (1981); Note, *Public Trust Doctrine—Beach Access—The Public's Right to Cross and to Use Privately Owned Upper Beach Areas,* 15 Seton Hall L. Rev. 344 (1985); Note, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine,* 79 Yale L.J. 762 (1970); Note, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches,* 64 N.C. L. Rev. 159, 175-91 (1985); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention,* 68 Mich. L. Rev. 473 (1970); Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right,* 14 U.C. Davis L. Rev. 195 (1980).

[3]*The Institutes of Justinian* 2.1.1 (1870), *quoted* in *National Audubon Society v. Superior Court,* 33 Cal.3d 419, 433-34, 658 P.2d 709, 718 (1983). *See also Matthews v. Bay Head Improvement Ass'n,* 95 N.J. 306, 316-17, 471 A.2d 355, 360, *cert. denied,* — U.S. —, 105 S.Ct. 93 (1984). Interestingly, under Roman law, the "shores of the sea" extended beyond the mean high-tide line "to the limit reached by the greatest winter flood," and thus included all of the beach up to the line of vegetation. *The Institutes of Justinian* 2.1.3.

[4]Under English law, the King owned the sea, the submerged lands, and the tidelands, and the sovereign kept them in trust for the public uses of navigation, commerce, and fishing; although the Crown could grant ownership of the foreshore to private individuals, any grantee took title subject to this public right, or *jus publicum,* of navigation and fishing. *See generally Shively v. Bowlby,* 152 U.S. 1 (1894); *Arnold v. Mundy,* 6 N.J.L. 1 (1821).

King of England in public trust lands in this country were vested in the individual states, subject to the federal navigational servitude. *Shively v. Bowlby,* 152 U.S. 1 (1894).

This Court established the foundation for the modern development of the public trust doctrine in a series of cases upholding the principle that the tidelands and navigable waters are held by the states in trust for the public's use. *Martin v. Wadell,* 41 U.S. (16 Pet.) 367, 410 (1842), confirmed that "the people of each state . . . hold the absolute right to all their navigable waters, and the soils under them for their own common use . . . ." In *Barney v. Keokuk,* 94 U.S. 324 (1876), the Court applied the "equal footing doctrine" and held that each new state, upon admission to the Union, succeeded to the sovereign's ownership of tidal property and was thereafter free to determine for itself all rights and title in the tidelands. Finally, in the landmark decision of *Illinois Central Railroad Co. v. Illinois,* 146 U.S. 387 (1892), the Court established the important principle that a state, as administrator of the tidelands trust on behalf of the people, cannot abdicate its responsibilities as trustee in favor of private parties.[5]

As might be expected in a state where 85% of the population lives within 30 miles of the coast, California law has fully embraced the public trust doctrine and given it an expansive interpretation. From the earliest days of statehood, the California courts recognized and enforced the state's trust obligations. *See, e.g., Eldridge v. Cowell,* 4 Cal. 80, 87 (1854). The first comprehensive analysis

[5]In *Illinois Central,* the state Legislature had granted the railroad company fee simple title to virtually the entire waterfront of Chicago. Four years later, the Legislature changed its mind and sought to repeal the conveyance. The Court upheld the revocation, ruling that because title to the shorelands was held in trust for the people of the state, the Legislature did not have the power to convey that title to a private party free of the trust: "Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such water for the use of the public." 146 U.S. at 452-53.

and application of the public trust doctrine in California is found in *People v. California Fish Co.*, 166 Cal. 576, 138 P. 79 (1913), which involved title to some 80,000 acres of tidelands that had earlier been conveyed to private parties by the state. After examining the grants and determining that the conveyances had not been made for trust purposes, the California Supreme Court held that the grantees' property interest did not include absolute title to the land. Instead, they owned the soil subject to a public easement for trust uses, and subject to the state's right, as administrator of the trust, "to enter upon such lands and make such erections thereon, or changes therein, as it may find necessary or advisable to adapt the premises for use in navigation, *and provide access thereto for that purpose*, or in furtherance thereof." 166 Cal. at 588, 138 P. at 84 (emphasis added). Rejecting the purchasers' claim that they were entitled to compensation, the Court explained that the landowners did not lose title, but retained it subject to the public trust; while the State could not "retake the absolute title without compensation," it could take action to promote the public trust without such payment. *Id.* at 599, 138 P. at 94. *Accord City of Berkeley v. Superior Court, supra* (grantees of 79 acres of shoreline land hold title subject to public trust, and no taking occurs as a consequence of establishing public trust rights in that land).

As public needs have evolved over the years, the scope of the public trust doctrine in California has expanded to respond to those needs. Thus, for example, in *Marks v. Whitney*, 6 Cal.3d 251, 491 P.2d 374 (1971), the California Supreme Court held that the public's interest in trust property was not limited to the traditional triad of uses—navigation, commerce, and fishing—but included as well such rights as boating, bathing, general recreation, and the ecological preservation of lands in their natural state. Noting that the scope of the public trust right of access was a matter "of great public importance, particularly in view of population pressures, demands for recreational property, and the increasing development of sea-

shore and waterfront property" (*id.* at 257, 491 P.2d at 378), the state Supreme Court declared: "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the state is not burdened with an outmoded classification favoring one mode of utilization over another." *Id.* at 259, 491 P.2d at 380.

In like manner, the California courts have expanded the scope of lands impressed with the public trust. Recognizing that circumstances and conditions have changed since the doctrine's original application to the tidal waters and lands of England, the California courts have adopted a functional view of the public trust doctrine that permits imposition of a limited public easement on those waters and lands not historically covered by the public trust if such an easement is nevertheless necessary to preserve the enjoyment of a public trust right. *See, e.g., State v. Superior Court* (*Lyon*), 29 Cal.3d 210, 625 P.2d 239, *cert. denied*, 454 U.S. 865 (1981) (extending coverage to non-tidal lake shore zone); *National Audubon Society v. Superior Court, supra* (extending doctrine to non-tidal, non-navigable waters). In addition, California court decisions have strengthened the authority and obligations of the state as administrator of the public trust. As the state Supreme Court recently summarized the role of the doctrine in California:

> [T]he public trust is more than an affirmation of state *power* to use public property for public purposes. It is an affirmation of the *duty* of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.

National Audubon Society v. Superior Court, 33 Cal.3d at 441, 658 P.2d at 724 (emphasis added).[6]

---

[6]The California common law's commitment to the public's right of access to the coast manifests itself in another common

(Continued on following page)

Indeed, recognition of the public's right of access to and use of the shoreline is of such special significance in California that the public trust doctrine's essential features were incorporated into the state Constitution itself. For over one hundred years, the California Constitution has expressly protected the public's right of access to the tidelands. Article X, section 4 declares:

> No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall be always attainable for the people thereof.

(Continued from previous page)

law doctrine—implied dedication. In the companion cases of *Gion v. City of Santa Cruz* and *Dietz v. King*, 2 Cal.3d 29, 465 P.2d 50 (1970), the California Supreme Court held that the public can acquire a recreational easement in privately owned beach property through continuous and uninterrupted public use for the five-year statutory prescriptive period. All that need be shown is that the public has treated the land as public with the landowner's full knowledge, but without having asked or received his permission; once such public use is established, the burden shifts to the landowner to refute the implied dedication to the public by proving that he has merely granted a license or that he has made a bona fide effort to prevent public use. *Id.* at 41, 465 P.2d at 57. A similar doctrine is employed in Texas to establish public rights in private beaches. *See Seaway Co. v. Attorney General*, 375 S.W.2d 923 (Tex. Civ. App. 1964); *see also City of Daytona Beach v. Tona-Rama, Inc.*, 271 So.2d 765 (Fla. Dist. Ct. App. 1972) (finding that public use of beach area for more than 20 years established prescriptive right to continue that use). Two other states, Oregon and Hawaii, have applied the somewhat analogous doctrine of "customary use" to confirm the public's recreational rights in privately owned beachfront property. *See State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969); *In re Application of Ashford*, 50 Hawaii 314, 440 P.2d 76 (1968).

The state Constitution thus not only preserves the public's common-law right of access to the shore against any competing claim by a beachfront property owner of the right to preclude such access, but it imposes an obligation on the Legislature to enact laws that will guarantee that right of access for the people of the state.[7]

In sum, private beachfront property owners in California have never been held to take title to their land free and clear of the state's dominant right to burden that property in order to promote the public trust rights of the state's citizens. Historically, one of the most precious of those rights has been the public's right of access to the ocean and the shore. Where, as here, the state is acting to fulfill its public trust obligations to preserve such access, the right of the private property owner to exclusive use of the beach is subservient to the paramount interests of the public.

B. The Coastal Commission's Imposition of a Public Access Condition Merely Preserves Existing Public Rights of Access in Response to the Threat Posed to Those Rights by New Coastal Development.

The Coastal Commission's action in this case—conditioning the permit for the Nollans' new development on their recording a deed restriction acknowledging the public's right to pass and re-pass along the dry-sand beach—is precisely the type of state action promoting the public trust purposes that is mandated by the public trust doctrine and the state Constitution. The permit condition,

---

[7]As the California Supreme Court explained in *City of Berkeley v. Superior Court, supra*, the language now found in article X, section 4 of the state Constitution was added in direct response to widespread abuses in the disposition of tidelands and specifically addressed the need to preserve public right-of-ways to the state's navigable waters. As one legislator lamented in the debates preceding adoption of the constitutional measure, the state's grants of beachfront property in the preceding 25 years had nearly resulted in "the monopolizing of every frontage upon navigable waters in this state . . . by private individuals . . . ." 26 Cal.3d at 523, 606 P.2d at 366.

which was carefully tailored to the specific circumstances of the Nollans' property, does nothing more than formalize and preserve in perpetuity the pre-existing public rights of access over their beach. And it does so without interfering with any of the Nollans' own cognizable interests in the upland property.

1. The permit condition implements the Coastal Commission's constitutional and statutory obligation to preserve public access to and along the coast.

The Commission's action was taken under the authority and obligation of the Coastal Act of 1976, which is the principal legislative means of discharging the state's public trust obligations and fulfilling the constitutional mandate of Article X, section 4.[8] One of the primary objects of the Coastal Act is to "maximize public access to and along the coast" (Cal. Pub. Res. Code § 30001.5(c)) by preserving existing public rights of access to the shoreline and expanding them for the future. *Pacific Legal Foundation v. California Coastal Comm'n*, 33 Cal.3d 158, 163, 655 P.2d 306, 308 (1982). To that end, the Coastal Act contains a number of provisions—sections 30210 to 30214 of the Public Resources Code—that are designed to preserve public access rights. At issue here is the requirement that approval for any new development project along the coast be conditioned on the property owner's formal acknowledgment of public access rights to and along the shoreline. *See* Pub. Res. Code § 30212.[9]

---

[8]Various other California statutes also seek to implement the constitutional and common-law guarantees preserving public rights of access to trust resources. *See, e.g.*, Cal. Gov't Code §§ 66478.4 (public access to river or stream banks); 66478.5 (access along riverbank); 66478.11 (access to ocean coastline or bay shoreline). *See generally Kern River Public Access Ctte. v. City of Bakersfield*, 170 Cal.App.3d 1205, 217 Cal.Rptr. 125 (1985).

[9]As the Coastal Commission's Public Access Guidelines explain, the formal acknowledgement of a public right of access may take one of three forms: grant of a fee interest in

(Continued on following page)

The Commission's beach access dedication requirement clearly furthers traditional public trust functions. As the Constitution and the Coastal Act expressly recognize, the public's entitlement to use the state's tidelands for recreational and other purposes would be meaningless unless the public can be assured of access to the tidelands: A necessary corollary of the public trust right to *use* the tidal lands and waters, then, is the right to gain *access* to them; where those lands and waters are bounded by a dry-sand beach area held as private property, the public trust rights include at least the right to pass and re-pass over that beach in order to reach the tidelands.[10] In California, therefore, this public access right is implicitly protected by the common-law public trust doctrine and is explicitly guaranteed by Article X, section 4 of the state Constitution and by the public access provisions of the Coastal Act.[11]

(Continued from previous page)

the accessway (appropriate only in extraordinary circumstances); an offer to dedicate an access easement (the most common mechanism); or, as in this case, a mere deed restriction (used only in limited situations to ensure that existing public use is not precluded by subsequent actions of this or a future landowner). *See* Joint Appendix ("J.A.") 381-84.

[10]In certain circumstances, as the New Jersey Supreme Court has recognized, the public trust rights include both the right of access across the upland beach to the foreshore and the right to *use* the privately owned dry-sand beach for certain trust purposes:

> The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed. The complete pleasure of swimming must be accompanied by intermittent periods of rest and relaxation beyond the water's edge. . . . The unavailability of the physical situs for such rest and relaxation would seriously curtail and in many situations eliminate the right to the recreational use of the ocean.

Matthews v. Bay Head Improvement Ass'n, 95 N.J. 306, 325, 471 A.2d 355, 365, *cert. denied*, — U.S. —, 105 S.Ct. 93 (1984).

[11]The Commission's coastal access exaction policy also serves to protect the public's recreational use of privately owned beaches where that right has been acquired through implied

(Continued on following page)

2. The permit condition responds directly to the need for public access to which new coastal development contributes.

The access dedication exaction is a narrowly drawn mechanism for implementing the state's public trust obligations in response to the change in circumstances caused by new coastal development. The state's public trust powers may be asserted at any time, of course, and the public's access easement is therefore not extinguished by the failure formally to record it at an earlier date. *See Illinois Central R.R. Co. v. Illinois,* 146 U.S. at 455-56 ("the power to resume the trust whenever the State judges best is, we think, incontrovertible"). Furthermore, as indicated previously, public trust rights must continuously be adjusted to respond to evolving public needs. *See* Part A.2 *supra.* Proposals for new coastal development, both in general and in the specific context of this case, present a sufficient threat to the quality and availability of public access along the California coastline to justify the Commission's constitutionally mandated policy of requiring a beach access dedication as a condition for approving new development projects.

The present case provides an excellent demonstration of both the reasonableness of the access dedication requirement and the unreasonableness of the Nollans' taking claim. The evidence before the Coastal Commission showed that the public has historically made extensive use of the Nollans' beach. J.A. 48, 85-86.[12] Construction of the Nollans'

(Continued from previous page)

dedication or prescriptive easements. Both the Coastal Act, in section 30211, and the Commission's Access Guidelines (J.A. 353-54), require that the Commission, in issuing permits for new coastal development, take necessary action to preserve the public's existing uses. In the present case, there was considerable evidence that the entire area seaward of the Nollans' seawall had been impliedly dedicated to public use. J.A. 85-86.

[12]Curiously, the Nollans admit that they have freely permitted the public not only to pass along, but to use, the beach in front of their house. J.A. 303, 312-13. Indeed, the Nollans

(Continued on following page)

new, substantially larger home, coupled with its intended change in use as a permanent, year-round residence, places a burden on existing physical and visual access along the coast and poses the danger that public access might be obstructed—either intentionally through the actions of the Nollans or some future owners of their property, or unintentionally through the public's perception that the beachfront is no longer available for public passage due to the encroaching nature of the new development. Further, the gradual build-out of Faria Beach—which takes the form of individual project applications like the Nollans', but results in the private development and monopolization of miles of precious coastal resources—typifies the pattern of coastal development in California; as a consequence of this continuing build-out, existing public access opportunities are drastically diminishing at exactly the same time that the demand for public access to the beach is increasing.

The deed restriction sought by the Coastal Commission responds directly and narrowly to the state's need and obligation to preserve the public's right of access. In accordance with the Coastal Act (Pub. Res. Code § 30214(b)) and the Commission's own Access Guidelines (J.A. 359, 369-72), the deed restriction balances the competing interests of the public and the private landowner: By limiting the public's use of the beach to the right to pass and re-pass along a narrow strip below the Nollans' six-foot seawall, the permit condition protects their privacy and intrudes

---

(Continued from previous page)

do not have any objection to giving the public a lateral access right to walk across their beach (*id.* at 312-14); it is only the principle that they could be *forced* to permit such access to which they object (*id.* at 313-14, 318). The deed restriction required by the Coastal Commission, of course, would apply to future owners who might not be as hospitable as the Nollans—and would bind the Nollans themselves should they subsequently have a change of heart.

minimally on their own use of the beach;[13] it likewise takes into account the availability of nearby public beach facilities and therefore seeks primarily to ensure only that an access corridor is maintained along the coastline. In addition, the permit condition is imposed while the Nollans' beach is still fully adaptable for trust uses, without any negative impact on their vested rights and before they could have developed any reasonable investment-backed expectations in the exclusive use of the dry-sand beach. *See City of Berkeley v. Superior Court,* 26 Cal.3d at 534, 606 P.2d at 373.

In short, the deed restriction demanded by the Coastal Commission is a reasoned response to the Nollans' development proposal that simultaneously takes into account the need to preserve public access rights, the burdens imposed on those rights by the new development, and the private property rights of the Nollans themselves.

---

[13]Contrary to the Nollans' characterization, the extent of public use permitted by the deed restriction in this case does not amount to a traditional "physical invasion" of the Nollans' property. *See Whaler's Village Club v. California Coastal Comm'n,* 173 Cal.App.3d 240, 257-58, 220 Cal.Rptr. 2, 11-12 (1985) (distinguishing this Court's "physical invasion" cases from public access dedication situation on ground that the former involved no action by the landowner triggering the police power of the state). As the very case appellants rely upon makes clear, to constitute a taking, the physical invasion must be exclusive and permanent, dispossessing the owner of his right to use his own property. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419, 427-30, 435 n.12 (1982). *See also Pruneyard Shopping Center v. Robins, supra.* The Court in *Loretto* summarized the distinction between an unlawful physical invasion and a permissible public easement:

> The use which the [company] makes of the streets is an exclusive and permanent one, and not one temporary, shifting and in common with the general public. The ordinary traveler, whether on foot or in a vehicle, passes to and fro along the streets, and his use and occupation thereof are temporary and shifting. . . . But the use made by the telegraph company is, in respect to so much of the space as it occupies with its poles, permanent and exclusive.

458 U.S. at 428-29 (quoting *St. Louis v. Western Union Telegraph Co.,* 148 U.S. 92, 98-99 (1893)) (emphasis omitted).

C. Prior Judicial Decisions Refute the Nollans' Claim That a Public Access Dedication Condition Constitutes a Taking Requiring Just Compensation.

1. The courts have consistently upheld government action taken to implement overriding public trust rights, even at the expense of upland landowners' private property interests.

In light of the important state policy promoting public access to the coast, the California courts have long accorded great deference to government action designed to promote public rights in the tidelands, even where that action "has resulted in damage to the property rights of upland owners" and "even though the action might be deemed a taking in a non-trust context." *Grupe v. California Coastal Comm'n,* 166 Cal.App.3d 148, 171-72, 212 Cal.Rptr. 578, 592-93 (1985) (collecting cases). These decisions are founded on the recognition that the rights of riparian or littoral owners in the waters adjoining their property—including their right of exclusive access to those waters—are subservient to the state's right to promote the public trust. The cases

> demonstrate the continuing power of the state as administrator of the public trust, a power which extends . . . to the enforcement of the trust against lands long thought free of the trust. . . . [T]he grantee holds subject to the trust, and while he may assert a vested right to the servient estate (the right of use subject to the trust) and to any improvements he erects, he can claim no vested right to bar recognition of the trust or state action to carry out its purposes.

National Audubon Society v. Superior Court, 33 Cal.3d at 440, 658 P.2d at 723.

The nature of the public's interest, and the extent of the permissible state intrusion on upland property rights in order to further trust purposes, may best be seen in *Miramar Co. v. City of Santa Barbara,* 23 Cal.2d 170, 143 P.2d 1 (1943). The plaintiff in *Miramar* was the owner of a beachfront hotel and resort along the coastline just east of Santa Barbara. When the city built a breakwater

to create a public harbor, the natural drift of sand down the coast was blocked and the sand that was there eventually eroded away. In time, plaintiff's beach completely disappeared, even above the old mean high-tide line, and the hotel ceased to be a beach resort. The owner then sued the city, claiming that an unconstitutional taking had occurred. The California Supreme Court denied any recovery, holding that the plaintiff's littoral rights (*i.e.*, those rights resulting from the proximity of its land to the ocean) "from the beginning [were] subject to termination by the state." 23 Cal.2d at 176, 143 P.2d at 4. Significantly, the government action in *Miramar* did not merely impose a limited public easement over the landowner's property, as in the Nollans' case, but essentially destroyed the privately owned beach altogether. Yet the court nevertheless concluded that no taking had occurred because the city had acted in furtherance of its public trust obligations. *See Grupe v. California Coastal Comm'n,* 166 Cal.App.3d at 172, 212 Cal.Rptr. at 593.[14]

[14]The decision in *Miramar* followed the reasoning first set forth by the California courts in *People v. Southern Pacific R.R. Co.*, 166 Cal. 627, 138 P. 103 (1913), and *Henry Dalton & Sons Co. v. Oakland*, 168 Cal. 463, 143 P. 721 (1914). In each of those cases, the government proposed to build improvements in furtherance of the public trust that would have the effect of cutting off the upland owner's access to the adjacent tidelands and water. The riparian landowners claimed that they had a personal right of access to the tidelands and water, and that the State could not act to destroy that right of access without providing compensation. In each case, however, the California Supreme Court rejected the claim, explaining that the riparian landowner "had no right as an upland owner to the free and unobstructed access to navigable waters over [the] tidelands as against the right of the state to at any time devote them to the improvement of the harbor . . . in aid of the public easement of navigation and commerce . . . ." *Henry Dalton & Sons Co.*, 168 Cal. at 468, 143 P. at 723. *See also Colberg, Inc. v. State of California ex rel. Dept. of Pub. Works*, 67 Cal.2d 408, 425, 432 P.2d 3, 14 (1967), *cert. denied*, 390 U.S. 949 (1968) ("the state, through the proper exercise of its trust power to deal with navigable waters, may impair without compensation rights appurtenant to property riparian or littoral to such waters").

In the analogous context of the federal "navigational servitude," this Court's decisions have likewise held that interference with (or even destruction of) riparian rights does not amount to a taking where the damage to private property interests resulted from an exercise of the public right of navigation over interstate waters. "When the Government exercises this servitude, it is exercising its paramount power in the interest of navigation, rather than taking the private property of anyone." *United States v. Kansas City Life Ins. Co.*, 339 U.S. 799, 808 (1950). Any loss in value that is related, either directly or indirectly, to the riparian owner's "access to, and use of, navigable waters" has thus been held to be noncompensable. *United States v. Rands,* 389 U.S. 121, 124-25 (1967). For example, the Court has found that no compensation is owed to a private property owner for loss in "head" resulting from raising the level of a stream (*United States v. Willow River Power Co., supra*); for loss in water power due to reduction of the navigable water's flow (*United States v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53 (1913)); for damage to structures erected between the low- and high-water marks (*United States v. Chicago, Milwaukee, St. Paul & Pacific R.*, 312 U.S. 592 (1941)); for loss of value to riparian land based upon its potential use in navigational commerce (*United States v. Rands*, 389 U.S. 121 (1967)); and—as in *Miramar*—for loss of access to navigable water caused by state-constructed improvements (*Scranton v. Wheeler*, 179 U.S. 141 (1900)). In each of these cases, the Court dismissed a takings challenge because, although the government action had undeniably caused the property owner economic harm, it did not interfere with interests that were sufficiently bound up with the reasonable expectations of the claimant to constitute "property" for Fifth Amendment purposes. *See Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124-25 (1978).[15]

[15]The decisions in this area have recognized that the private landowner's title to the land under and adjacent to navigable water

(Continued on following page)

That is precisely the situation in the instant case. Here, the Nollans seek to claim an exclusive right of access to the tidelands over the dry-sand portion of their beach. Under the public trust doctrine and California law, however, that right of access is one that does not belong to the Nollans alone, but must be shared with the public at large. The Coastal Commission's permit condition requiring the recording of a deed restriction acknowledging the public's right to pass and re-pass over that narrow strip of beach simply ensures that the public's historical right of access will be preserved. As such, the Commission's action constitutes a proper exercise of the state's power and obligation to implement the public trust, and any "damage sustained does not result from taking property from riparian owners within the meaning of the Fifth Amendment but from the lawful exercise of a power to which the interests of riparian owners have always been subject." *United States v. Rands*, 389 U.S. at 123.[16]

(Continued from previous page)

> is not as full and complete as his title to fast land which has no direct connection with the navigation of such water. It is a qualified title, a bare technical title, not at his absolute disposal, as is his upland, but to be held at all times subordinate to such use of the submerged lands and of the waters flowing over them as may be consistent with or demanded by the public right of navigation.

Scranton v. Wheeler, 179 U.S. at 163.

[16]*See also Kaiser Aetna v. United States*, 444 U.S. 164, 187-91 (1979) (Blackmun, J., dissenting). The majority in *Kaiser Aetna* acknowledged that "the strict logic of the more recent cases limiting the Government's liability to pay damages for riparian access . . . might completely swallow up any private claim for 'just compensation' under the Fifth Amendment . . . ." *Id.* at 177. The Court concluded, however, that the government's attempt to create a public right of access in that case went so far beyond ordinary regulation or improvement for navigation as to amount to a taking, because the marina owners—with the government's prior approval—had invested millions of dollars in improving a pond that had not been a navigable water and had always been considered to be private property under state law. These circumstances were said to have given fruition to a reasonable expectancy that the government

(Continued on following page)

2. The courts have consistently held that no taking occurs where a public access dedication is required as a condition of permit approval.

The Nollans' contention that the permit condition imposed by the Coastal Commission constitutes an unlawful taking is refuted not only by the above-cited court decisions repeatedly rejecting takings challenges to government action designed to promote public trust interests, but by the overwhelming line of authority upholding dedication exactions and permit conditions in a variety of other contexts. The reasoning of these cases makes it abundantly clear that the beach access exaction imposed on the Nollans does not constitute a taking unless it were to deprive them of all "economically viable" use of their property. That is concededly not the case here.

(Continued from previous page)

could not, without paying just compensation, require the marina owners to allow free access to the dredged pond while the owners' agreement with their own customers called for an annual fee. *Id.* at 178-80.

The Nollans can claim no comparable investment-backed expectancy in this case. Not only has it been clear for the past 100 years under California law that the public retains a right of access over privately held beaches for public trust purposes, but the public has in fact been exercising that right over the Nollans' beach without objection from them or from the previous owners. *See* J.A. 85-86, 303. Moreover, even if the Nollans could claim "ignorance" of the law, they knew of the Coastal Commission's specific implementation of the public trust rights of access over their beach through its imposition of conditions on their development permit *before* they ever exercised their option to purchase the property. Jurisdictional Statement, at 5 n.1. *Cf. Andrus v. Allard*, 444 U.S. 51, 64 n.21 (1979) (timing of acquisition is important factor in determining investment-backed expectations). In any event, unlike the situation in *Kaiser Aetna*, where the property owners had spent millions of dollars in reliance on their private property expectancy, the price the Nollans paid for their property should have—or at least could have—taken into account any impact of the public access condition imposed by the Coastal Commission. In short, the Nollans have neither any investment, nor any legitimate expectation, in an exclusive right of access to the tidelands over their beach, and the compensation to which they claim an entitlement would only be a windfall.

In California, of course, this issue is beyond dispute. Both in the general context of subdivision exactions (*see, e.g., Associated Home Builders v. City of Walnut Creek,* 4 Cal.3d 633, 484 P.2d 606 (1971)) and in the specific context of Coastal Commission beach access dedications, the California courts have consistently held that "[a] regulatory body may constitutionally require a dedication of property in the interests of the general welfare as a condition of permitting land development. It does not act in eminent domain when it does this . . . ." *Grupe v. California Coastal Comm'n,* 166 Cal.App.3d at 172, 212 Cal. Rptr. at 593-94 (quoting *Georgia-Pacific Corp. v. California Coastal Comm'n,* 132 Cal.App.3d 678, 699, 183 Cal. Rptr. 395, 407 (1982)). *Accord Sea Ranch Ass'n v. California Coastal Comm'n,* 527 F.Supp. 390, 393-97 (N.D. Cal.) (three-judge court), *vacated as moot,* 454 U.S. 1070 (1981); *Whaler's Village Club v. California Coastal Comm'n,* 173 Cal.App.3d at 256-58, 220 Cal.Rptr. at 10-12; *Liberty v. California Coastal Comm'n,* 113 Cal.App.3d 491, 500, 170 Cal.Rptr. 247 (1980). Thus the courts have uniformly upheld the Coastal Commission's authority to require a dedication of public access as a condition of permit approval, and they have likewise rejected the contention—raised again here by the Nollans—that the validity of the dedication condition under the Takings Clause is dependent upon a specific factual showing in each case that the proposed development has created the need for the dedication. *See Georgia-Pacific Corp. v. California Coastal Comm'n,* 132 Cal.App.3d at 699, 183 Cal.Rptr. at 407.

While this Court has not heretofore issued a plenary decision upholding the validity of the Commission's beach access exactions,[17] the takings jurisprudence developed in

[17]This Court has repeatedly dismissed appeals from the California decisions for want of jurisdiction or of a substantial federal question, however. *See, e.g., Whaler's Village Club,* — U.S. —, 106 S.Ct. 1962 (1986); *Remmenga v. California Coastal Comm'n,* — U.S. —, 106 S.Ct. 241 (1985); *Associated Home Builders v. City of Walnut Creek,* 404 U.S. 878 (1971).

other contexts leads to the same conclusion reached by the California courts.[18] In *United States v. Riverside Bayview Homes, Inc.,* — U.S. —, 106 S.Ct. 455 (1985), for example, the Court emphasized that "[a] requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense . . . . Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred." 106 S.Ct. at 459. *A fortiori,* then, the Coastal Commission's *granting* of a permit with a public access condition cannot constitute a taking unless the effect of that condition is likewise to prevent "economically viable" use of the property. Such a claim would of course be frivolous in this case, and the Nollans have not even attempted to meet that burden.[19]

Similarly, *Ruckelshaus v. Monsanto Co.,* 467 U.S. 986 (1984), rejected a takings challenge to the EPA's disclos-

[18]As an initial matter, it is difficult to see how the language of the Takings Clause can be stretched to apply to the circumstances of this case. The text of the Fifth Amendment suggests that there must be some affirmative, initiatory act by the government that triggers the constitutional proscription. Here, by contrast, it is the Nollans who have forced the action themselves by requesting something from the government—a permit to proceed with new development in the coastal zone. The state has merely responded to that request by specifying the conditions under which its approval would be granted. The Nollans now have a choice: they may continue the existing use and leave things precisely as they are now; or they may build their new home, subject to the Coastal Commission's conditions. In neither event can the government reasonably be said to have "taken" anything from what the Nollans currently possess.

[19]The Court in *Riverside Bayview Homes* elaborated somewhat on the nature of the takings inquiry in any particular case: "Whether the denial of a permit would constitute a taking in any given case would depend upon the effect of the denial on the owner's ability to put the property to productive use." 106 S.Ct. at 459 n.4. *Cf. Agins v. City of Tiburon,* 447 U.S. 255, 260 (1980) (application of general zoning law to particular property effects a taking if the ordinance "does not substantially advance legitimate state interests" or "denies an owner economically viable use of his land").

ure of trade-secret data submitted by an applicant for registration of a pesticide. The Court reasoned that it "can hardly be called a taking" to require a property owner to comply with conditions that are rationally related to a legitimate government interest and are imposed in exchange for receipt of the economic advantages of government regulation—at least not where the property owner is aware of the conditions when it applies for government approval. *Id.* at 1007.[20] Here, too, the public access permit condition is rationally related to a legitimate government interest and is imposed in exchange for receipt of a valuable government benefit. As the California Court of Appeal observed in *Grupe v. California Coastal Comm'n,* permit applicants like the Nollans receive a substantial benefit by being allowed to proceed with the development of their property, thereby greatly increasing its value. 166 Cal.App.3d at 176-77, 212 Cal.Rptr. at 596-97. The *quid pro quo* for this tremendous benefit is the landowners' agreement to acknowledge and preserve public access to the tidelands and the ocean—a small "price" indeed. Furthermore, the Nollans receive the "reciprocal advantage" resulting from the Coastal Act's policy of requiring public access dedications for all beachfront development; indeed, because the Nollans live on the beach, they are likely to be the prime beneficiaries of the Commission's comprehensive coastal access program. *Cf. Penn Central Transp. Co. v. City of New York,* 438 U.S. at 134-35 (fact that owner of building designated as landmark benefits from city's comprehensive preservation law

[20]In *Monsanto,* this Court used a traditional takings analysis but rejected the property owner's claim on the basis of only one of the three factors normally analyzed in such cases: the interference with reasonable investment-backed expectations. As discussed above, that same factor would likewise be dispositive in this case if a complete takings analysis were deemed necessary. See note 16, *supra.*

helps defeat claim that restrictions imposed on use of building constitute unconstitutional taking).[21]

The Nollans' takings argument simply fails to recognize that a public access exaction imposed as a condition for permit approval calls for a very different analysis than a similar access requirement that might be unilaterally imposed by the government in an effort to acquire privately owned resources for its own use. This critical distinction was underscored in *Kaiser Aetna v. United States, supra.* There, a taking was found to have occurred when the government, after allowing the property owners at a cost of several million dollars to dredge a new channel and convert their private pond into a marina, unilaterally attempted to impose a navigational servitude on the marina and open it up to free public use. But the Court was very careful to emphasize that the government could lawfully have conditioned its initial approval of the marina project on the landowners' agreement to comply with any requirements deemed necessary to protect the public's interest in navigable waters:

> We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation.

Kaiser Aetna v. United States, 444 U.S. at 179. *See also id.* at 191 (Blackmun, J., dissenting) ("In future cases, of course, the Army Corps of Engineers may alleviate this danger [of appropriation of navigable waters for

[21]Moreover, as in *Monsanto,* the Nollans were well aware that a public access dedication requirement would be imposed upon them at the time they applied for a development permit; they were certainly aware of the Commission's policy at the time they purchased their property and then built their new house. See note 16, *supra.*

private use] by conditioning permission for connection with other waterways on a right of free public access.'').

This is just what the Coastal Commission has done in this case. In an attempt to discharge its public trust duties, and as part of a comprehensive program designed to preserve public access opportunities up and down the California coast, the Commission has conditioned its approval of the Nollans' development application on their agreement to comply with a carefully tailored deed restriction that simply formalizes the public's historical and constitutional right to use the narrow strip of beach below the Nollans' seawall for access to the state-owned tidelands and water. Neither the language of the Fifth Amendment nor any of this Court's decisions remotely suggest that the imposition of such a permit condition can be considered a taking.[22]

---

[22]This is not to say that any permit condition that falls short of denying a landowner all "economically viable" use of her land is immune from constitutional challenge. Surely the Coastal Commission could not condition approval of the Nollans' development application on their agreement to plant a grove of oak trees in the Sierra wilderness, even if there was a pressing need for oak trees throughout the state. The Constitution clearly imposes limits on how far the government may go in the name of regulation. The appropriate limitation in the permit condition context, however, is not provided by the Takings Clause, but by the Due Process Clause; and the appropriate standard in measuring the constitutionality of such a condition is the one that has consistently been employed by the California courts, including the court below—whether the condition is designed to meet, and reasonably relates to, needs to which the project either directly or indirectly contributes. That standard is concededly satisfied in this case.

CONCLUSION

For these reasons, either the Nollans' appeal should be dismissed or the judgment of the California Court of Appeal should be affirmed.

FREDRIC D. WOOCHER*
Center for Law in the
Public Interest
10951 W. Pico Boulevard,
3rd Floor
Los Angeles, CA 90064
(213) 470-3000

JOHANNA H. WALD
Natural Resources
Defense Council
25 Kearny Street
San Francisco, CA 94108
(415) 421-6561

Attorneys for Amici Curiae

*Counsel of Record

APPENDIX

The interests of the individual amici are as follows:

The Natural Resources Defense Council, Inc. ("NRDC") is a nonprofit environmental membership organization incorporated under the laws of the State of New York. NRDC has over 68,000 members nationwide, more than 13,000 of whom live in California and regularly enjoy the state's coastal resources. NRDC has long sought to protect the nation's coastal resources from unwise development and use. Since passage of the Coastal Initiative in California in 1972, NRDC has engaged in legislative activities, administrative proceedings before the California Coastal Commission and other governmental bodies, public education efforts, and litigation to secure public access to the coast and adequate control of development in the coastal zone.

The Sierra Club is a nonprofit membership organization incorporated under the laws of the State of California. With more than 350,000 members nationwide, the Sierra Club has been actively involved for decades in efforts to protect the nation's coastal resources and to secure public access to those resources. In California, where the Sierra Club has approximately 150,000 members, the Club has fostered these objectives through lobbying, administrative proceedings before the state Coastal Commission and other governmental agencies, public information activities, and litigation.

The Coast Alliance is a nonprofit corporation organized under the laws of the District of Columbia. The Coast Alliance is a public interest organization formed in 1979 by groups and individuals concerned about the effects on

the coast of unprecedented development pressure. The Alliance was founded for the purpose of increasing public awareness of the coast's immense value, bringing new and important facts about the coast to public attention, encouraging groups across the country to work for protection of valuable coastal resources, and urging federal, state, and local governments to strengthen policies and programs to protect coastal ecosystems.

Amigos de Bolsa Chica is a nonprofit environmental organization with approximately 1,000 members, most of whom reside in Orange and Los Angeles counties in California. Its purpose is to secure the protection and restoration of the Bolsa Chica wetlands, some 1,000 acres of which lie within the coastal zone and are threatened by development. Amigos de Bolsa Chica has advocated the protection of these lands from unwise and environmentally damaging development before the California Coastal Commission and other governmental bodies.

COAAST—Californians Organized to Acquire Access to State Tidelands—was formed in 1968 in order to protect, obtain, and restore public access to publicly owned tidelands in Sonoma County, California. It seeks to further this objective through advocacy before administrative agencies, including the state Coastal Commission, lobbying activities, and public education.

The Committee for Green Foothills is a nonprofit membership organization incorporated under the laws of the State of California. The objectives of the Committee include conservation of the natural character, the scenic resources, and the open space qualities of the coastal zone in California's Santa Clara and San Mateo counties. The Committee for Green Foothills has engaged in public

education activities to secure these objectives and has appeared before administrative agencies and local government bodies to urge protection of coastal resources and increased public access to the coast.

Concerned Citizens to Save Oxnard Shores is a nonprofit corporation organized under the laws of the State of California. It has approximately 1,500 supporters, the majority of whom are residents of Ventura County, California. The organization's purpose is to inform the public about Oxnard Shores and to preserve and protect its beach and coastal resources from threatened development. To achieve this purpose, Save Oxnard Shores engages in public education activities, litigation and advocacy before state and local government and agencies, including the California Coastal Commission.

The League for Coastal Protection is a California nonprofit corporation consisting of a coalition of public interest and environmental organizations and individuals. It was created to protect, enhance, and restore coastal resources and the right of citizen access to those resources. To achieve these goals, the League engages in public education activities, lobbying, and advocacy before the California Coastal Commission and other governmental agencies.

The Marin Conservation League is a nonprofit, tax-exempt organization dedicated to preserve and protect the natural assets of Marin County, California for all people. The League has long sought to protect the county's coastal resources from unbalanced development and environmentally unsound use through close cooperation with city and county governments and active participation at the state and federal level.

The Planning and Conservation League Foundation is a statewide nonprofit California corporation which conducts research and public education projects on a wide variety of conservation topics of state and national importance. Incorporated in 1971, the Foundation has made protection of public access to, and natural value of, the California coastline an important priority. The Foundation's activities in furtherance of these objectives include publication of an extensive report analyzing the cost-effectiveness of California's regulatory programs to protect the state's coastline. The Foundation also publishes a bimonthly newsletter, ''Coastlines,'' which keeps Californians abreast of the latest developments in coastal protection efforts.

Scenic Shoreline Preservation Conference, Inc. is a nonprofit membership organization headquartered in Santa Barbara County, California. Concerned with energy, wildlife, and coastal issues, Scenic Shoreline has promoted controls over Santa Barbara Channel and West Coast tidelands and outer continental shelf development before the state Coastal Commission and other governmental bodies, including the U.S. Congress.

The Surfrider Foundation is a nonprofit organization incorporated under the laws of the State of California. The Foundation's objectives include the protection, preservation, and enhancement of the quality of the state's beaches and coastal waters, with special emphasis on ocean wave recreation and access thereto. To achieve these objectives, the Foundation has engaged in public education, conservation, and litigation activities, including appearances before the State Coastal Commission.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 6 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-133

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES; JOINED BY THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

KATHERINE E. STONE
BURKE, WILLIAMS
& SORENSEN
624 South Grand Avenue
Suite 1100
Los Angeles, CA 90017
(213) 623-1900
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
JOYCE HOLMES BENJAMIN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether the Constitution requires this Court to review the wisdom of the legislative judgment of the people of California and their elected representatives that approval of new development along the coast should be conditioned on the provision of reasonable public access to the state-owned tidelands.

2. Whether the Constitution requires a complex takings analysis of the application of the public access requirement each time that a property owner has a philosophical disagreement with that requirement.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF THE *AMICI CURIAE*	1
STATEMENT OF FACTS AND INTRODUCTION	3
SUMMARY OF ARGUMENT	6
ARGUMENT	8
I. CALIFORNIA'S COASTAL ACCESS LEGISLATION EFFECTS A REASONABLE ACCOMMODATION OF COMPETING LAND USES	8
A. The Public Owns The Tidelands And Is Entitled To Access To Them	8
B. Public Access To The Tidelands Is Burdened By New Development On The Beach	11
C. The Public Access Legislation Is A Proper Exercise Of The Power To Zone	14
II. APPELLANTS' PROPERTY HAS NOT BEEN TAKEN	18
A. The Coastal Commission Should Not Be Required To Prove The Constitutionality Of The Legislation Each Time That It is Applied	18
B. The Public Access Requirement Does Not Deprive Appellants Of Reasonable Value Or Use Of Their Property Or Any Reasonable Expectation To Exclude The Public	21
III. THIS COURT SHOULD NOT SIT AS A SUPREME BOARD OF ZONING ADJUSTMENT	25
CONCLUSION	27

TABLE OF AUTHORITIES

CASES: Page

Adams v. North Carolina Dept. of Natural and Economic Resources, 295 N.C. 683, 249 S.E.2d 402 (1978) 11
Agins v. City of Tiburon, 447 U.S. 255 (1980) 16, 17
Aunt Hack Ridge Estates, Inc. v. Planning Comm. of Danbury, 160 Conn. 109, 273 A.2d 880 (1970) 17
Avco Community Developers, Inc. v. South Coast Regional Comm., 17 Cal.3d 785, 132 Cal.Rptr. 386 (1976) 18, 24
Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964) 19
Blundell v. Catterall, 5 B. Ald. 268, 106 Eng. Rep. 1190 (K.B. 1821) 9
Board of Regents v. Roth, 408 U.S. 564 (1972) 19, 22
Borax Consolidated v. City of Los Angeles, 296 U.S. 10 (1935) 3, 9, 22, 23
Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) 19
City of Daytona Beach v. Tona-Rama, Inc., 294 So.2d 73 (Fla. 1974) 11, 23
City of Renton v. Playtime Theatres, Inc., 106 S.Ct. 925 (1986) 18-19, 26
Construction Industries Assn. of Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir.), *cert. denied*, 424 U.S. 934 (1976) 27
Creative Environments, Inc. v. Estabrook, 491 F. Supp. 547 (1980), *aff'd*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982) 16-17
Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 15, 17, 18, 20, 22, 27
Georgia-Pacific Corp. v. California Coastal Comm., 132 Cal. App. 3d 678, 183 Cal.Rptr. 395 (1982) 16
Gorieb v. Fox, 274 U.S. 603 (1927) 15, 25, 26
Grupe v. California Coastal Comm., 166 Cal. App. 3d 148, 212 Cal.Rptr. 578 (1985) 13, 17
Hadacheck v. Sebastian, 239 U.S. 394 (1915) 15
Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 26

TABLE OF AUTHORITIES—Continued

Page

Hudson v. Palmer, 468 U.S. 517 (1984) 16
Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892) 9
James v. Inhabitants of Town of West Bath, 437 A.2d 863 (Me. 1981) 15
Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673 (1966) 17
Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966) 17
Kaiser Aetna v. United States, 444 U.S. 164 (1979) 24, 25
Katzenbach v. McClung, 379 U.S. 294 (1964) 21
Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 24
Lusardi v. Curtis Point Property Owners Assn., 86 N.J. 217, 430 A.2d 881 (1981) 15
MacDonald, Sommer & Frates v. Yolo County, 106 S.Ct. 2561 (1986) 16
Marquez-Colon v. Reagan, 668 F.2d 611 (1st Cir. 1981) 15
Marsh v. Alabama, 326 U.S. 501 (1946) 22
Matthews v. Bay Head Improvement Assn., 95 N.J. 306, 471 A.2d 355, *cert. denied*, 469 U.S. 821 (1984) 10
Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 26
Mugler v. Kansas, 123 U.S. 623 (1887) 15, 17
Nectow v. City of Cambridge, 277 U.S. 183 (1928) 27
Parratt v. Taylor, 451 U.S. 527 (1981) 16
Penn Central Transportation Co. v. City of New York, 438 U.S. 104 (1978) 16, 17
Perez v. United States, 402 U.S. 146 (1971) 21
Pollard's Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845) 9
PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) 22, 23
Rancho Palos Verdes Corp. v. City of Laguna Beach, 547 F.2d 1092 (9th Cir. 1976) 27

TABLE OF AUTHORITIES—Continued

	Page
Ruckelshaus v. Monsanto, 467 U.S. 986 (1984)	24
Secretary of the Interior v. California, 464 U.S. 312 (1984)	15
Shively v. Bowlby, 152 U.S. 1 (1894)	8
Skagit County v. State, Dept. of Ecology, 93 Wash.2d 742, 613 P.2d 115 (1980)	15
State ex rel. Thornton v. Hay, 254 Or. 584, 462 P.2d 671 (1969)	11
State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. 363 (1977)	22
United States v. Locke, 471 U.S. 84 (1985)	20
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	17
Whalers' Village Club v. California Coastal Comm., 173 Cal. App. 3d 240, 220 Cal. Rptr. 2 (1985), *cert. denied*, 106 S.Ct. 1962 (1986)	12-13, 16
White v. Hughes, 139 Fla. 54, 190 So. 446 (1939)	10, 15
Wickard v. Filburn, 317 U.S. 111 (1942)	20
Williamson County Regional Planning Comm. v. Hamilton Bank, 105 S.Ct. 3108 (1985)	16
Young v. American Mini Theatres, Inc., 427 U.S. 50 (1976)	22, 26

CONSTITUTIONAL PROVISIONS:

U.S. Const. Amend. V	22
Cal. Const. art. X § 4	*passim*

STATUTES, REGULATIONS, AND RULES:

Federal:

16 U.S.C. § 1451	15
16 U.S.C. § 1452	15
16 U.S.C. § 1454	11, 15
26 U.S.C. § 4611	21
26 U.S.C. § 4661	21
26 U.S.C. § 4681	21
42 U.S.C. § 9631	21
33 C.F.R. § 320.4	11
33 C.F.R. § 325.4	11

TABLE OF AUTHORITIES—Continued

California:

	Page
Cal. Civ. Code § 3479	14
Cal. Civ. Proc. Code:	
§ 916	5
§ 1110	5
Cal. Coastal Act of 1976 (including "Public Access Legislation"), Cal. Pub. Res. Code, § 30000 *et seq.*	*passim*
Cal. Coastal Zone Conservation Act of 1972 (Coastal Initiative), Cal. Pub. Res. Code § 27000 *et seq.* (superseded)	*passim*
Cal. Pub. Res. Code:	
§ 30010	16
§ 30210	15
§ 30212	5, 24
§ 30214	15
California Coastal Plan, Dec. 1975	6, 10, 11, 14

BOOKS AND TREATISES:

78 Am. Jur. 2d, *Obstruction of, or Interference with, Waters or Navigation* (1975)	14
Annot., 43 A.L.R.3d 862 (1972)	19
Brower, "Beach Access Problems, Programs and Progress," in 2 *Coastal Zone '80* (B. Edge ed. 1980)	11
California's Battered Coast: Proceedings from a Conference in Coastal Erosion (J. McGrath ed. 1985)	12
64 C.J.S. *Municipal Corporations* (1950)	15
Coastal Zone '85 (O. Magoon ed. 1985)	12
Institutes of Justinian (T. Cooper trans. 1812)	8
Purdum and Frank, "Community Use of Exactions: Results of a National Survey," in *Development Exactions* (Frank and Rhodes ed. 1986)	19
U.S. Army Corps of Engineers, *Shore Protection Manual* (1984)	4, 12

TABLE OF AUTHORITIES—Continued

LAW REVIEWS AND PERIODICALS:	Page
"Beach Erosion: Some Good News," *Sunset* 72 (July 1986)	12
Carmichael, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C.L. Rev. 159 (1985)	10
Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970)	8
Sax, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970)	8
Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D.L. Rev. 195 (1980)	8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-133

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

---

BRIEF OF THE COUNCIL OF STATE GOVERNMENTS, U.S. CONFERENCE OF MAYORS, NATIONAL ASSOCIATION OF COUNTIES, NATIONAL CONFERENCE OF STATE LEGISLATURES, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, AND NATIONAL LEAGUE OF CITIES; JOINED BY THE AMERICAN PLANNING ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

INTEREST OF THE *AMICI CURIAE*

The *amici* are organizations whose members include state, county, and municipal governments and officials throughout the United States, and the American Planning Association, an organization of local and regional planners and officials concerned with good planning and orderly urban development. *Amici* and their members have a vital interest in the legal issues that affect the powers and responsibilities of state and local governments to regulate land use in the public interest.

This case presents a challenge by the purchasers of a beachfront lot to the application of provisions of California's coastal zone legislation that are designed to preserve the public's constitutional right of access to the state-owned tidelands. More broadly, however, the challenge threatens the fundamental ability of state and local governments to apply reasonable conditions, such as a dedication requirement, to the approval of new developments, in order to avoid or ameliorate their adverse impact. Many state and local governments have long imposed conditions that restrict the use of land on landowners who seek to develop their properties. Imposing set-back and height restrictions, or requiring the dedication of land for streets, sidewalks, schools, parks, open space, and other public purposes, are not only familiar and constitutional exercises of the police power, but are necessary to preserve the quality of life in our communities.

The public access condition imposed in this case is simply one such police power regulation. The condition has minimal impact on owners of property along the coastline, but is essential to ensure continued public access to the state-owned tidelands. Regulation of land use affecting the tidelands is uniquely necessary; both the federal government and coastal states such as California have recognized that such lands are not only affected by many competing interests, but are also highly vulnerable. If the coastal states, which have been encouraged by the federal government to exercise their authority over their coastal zones, are not permitted to take appropriate action to protect the public interest, this important resource may suffer irreversible damage.

Appellants argue that the statutory access requirement is valid only if the administrative agency proves that each proposed development has a "direct and definable adverse impact on public access." Br. 34. Such a test ignores the cumulative effect that the actions of individual landowners have on each other and on the public

interest. Property owners do not use their property in isolation. The actions of a large landowner who develops a tract of a thousand acres and the actions of numerous individuals who develop smaller plots may equally imperil the rights of the public. The California Legislature could properly determine that an access condition in each instance was necessary to protect each landowner and the public interest.

Amici submit that the decision of the California Court of Appeal was correct. Because this Court's decision will have a direct effect on matters of grave importance to *amici* and their members, *amici* respectfully submit this brief to assist the Court in its resolution of this case.[1]

STATEMENT OF FACTS AND INTRODUCTION

Amici agree with appellee's Statement and emphasize, in addition, the following facts.

Appellants have built a house on a narrow eroding beach lot on Faria Beach at the foot of the Rincon Mountain in Ventura County, California. The beach is located in a renowned surfing area commonly called the Rincon (J.A. 81, 255, 289), which the general public has been accustomed to using for many years. J.A. 85-86. Appellants' new two-story structure occupies most of the buildable space on the lot and completely blocks the ocean from view. J.A. 24-26. A high seawall, constructed to prevent the houses behind it from washing away, prevents the public from walking along the state-owned tidelands[2] during higher tides. J.A. 61, 68.[3] The sea-

---

[1] Pursuant to Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

[2] The terms "tidelands," "foreshore," and "wet sand," are used to refer to the area between mean low and mean high tides. J.A. 125; *see Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 25-27 (1935).

[3] See J.A. 262-64, 266; see also photograph from *Los Angeles Times*, App. A-1, *infra*.

wall also contributes to loss of beach sand along this unstable coastline.[4]

In 1972, when the people of California adopted the Coastal Initiative, this rocky beach was dotted with small vacation cottages. Their replacement over time with large permanent residences has created a wall between the public and the state-owned tidelands. J.A. 58-60. The Coastal Commission has granted permits for these new larger houses on the condition that the applicants offer deed restrictions designed to ensure that the public will be able to continue to walk along the shoreline.[5] J.A. 34. The terms of the deed restrictions for this beach were negotiated in 1979 with the representatives of the Faria family, who owned the entire beach tract. J.A. 48, 321-22. In 1982, the Faria family sold the property to the Faria Beach Trust. J.A. 312. Appellants purchased the property, which Mrs. Nollan's family had leased for more than forty years (J.A. 309-10), from the Trust during this litigation. Neither the Faria family nor appellants ever objected to the public's walking along the beach. In fact, Mr. Nollan testified that he had no objection to letting people continue to walk up and down the beach. Rather, his motivation for this appeal is based on "a difference in philosophy" as to what the law requires as a condition of building a new house. J.A. 313; 303.

[4] See U.S. Army Corps of Engineers, *Shore Protection Manual* (1984) [Vol. 1, Ch. 5 on Seawalls, Bulkheads and Revetments]: "When built on a receding shoreline, the recession on adjacent shores will continue and may be accelerated. Any tendency toward the loss of beach material in front of such a structure may well be intensified." *Id.* 5-3. A 1976 study of the California Resources Agency notes that beach erosion along this beach is "critical." J.A. 257. The seawalls along this beach evidence scarring from beach stones during wave attacks. Photographs of the area show large boulders placed on the beach and against the seawalls in an effort to retard the erosion. J.A. 261-76.

[5] The deed restriction limits public lateral access to walking and running in a direction parallel to the mean high tide line. No sports, picnicking, or active recreation is allowed. J.A. 293, 313.

This appeal stems from appellants' application for permission to demolish a small (521 square foot) substandard vacation cabin and build a new permanent residence more than three times the size of the former structure. J.A. 23, 31. The permit was administratively granted, subject to the same condition that had been applied to forty-three other new houses in the tract: that the public be allowed to continue to walk along what amounts to at most a ten-foot stretch of beach between the seawall and the mean high tide line of the Pacific Ocean. J.A. 47-48, 50, 69-70, 85-86.[6]

Appellants sued to invalidate the condition, and the trial court remanded the matter to the Coastal Commission for further proceedings. J.A. 36-39. After an evidentiary hearing, the Commission determined that the new development individually and cumulatively burdened public access to the ocean and that lateral access along the coast was required by the State's Public Access Legislation (part of the Coastal Act), Cal. Pub. Res. Code § 30212, which provides, in part, that "[p]ublic access . . . along the coast shall be provided in new development projects." J.A. 322-25.

The trial court granted appellants' supplemental petition for writ of mandamus. J.A. 412-13. The Court of Appeal reversed, holding that the access condition was valid and supported by substantial evidence under well-established California law. J.A. 421. The California Supreme Court denied appellants' petition for review. Upon filing this appeal, appellants disclosed for the first time that they had already built their new house without a valid coastal permit.[7]

[6] The actual location of the mean high tide line, appellants' seaward boundary, is uncertain and may at times be located landward of the seawall. J.A. 294.

[7] The Commission's appeal of the trial court's decision automatically stayed the trial court's order. Cal. Civ. Proc. Code §§ 916, 1110.

SUMMARY OF ARGUMENT

California's Coastal Act, including its Public Access Legislation, represents a reasonable accommodation of the public's right of access to the ocean's shores and the right of beachfront landowners to the enjoyment of their property. The common law principle that the tidelands are held in trust by the government for all the people traces its lineage to ancient Roman law and was acknowledged by this Court more than 100 years ago. The Court has repeatedly recognized that rights and interests in the tidelands are matters of local law, subject to the sovereignty of the States.

The State's obligation to protect the public's right of access to the tidelands has been enshrined in California's Constitution, reinforced by a 1972 popular Initiative, confirmed in a Coastal Plan, and implemented by the public access requirement. California's concern for public access to the shore, which is shared by at least twenty-one other States, has been encouraged by the federal government, which specifically approved California's Coastal Plan, including the public access requirement.

Development on the beach burdens the public's right of access to the tidelands and the ocean in numerous ways: by physically blocking use of the tidelands during higher tides, as in this case; and, in this and other cases, increasing erosion, blocking visual access to the sea, and channeling public users to overcrowded public beaches. The effects of beach development are cumulative, and they require legislative solutions that balance the rights of the individual property owners against the rights of other landowners and the public's constitutional right of access. California's public access requirement is similar to dedication requirements imposed by state and local governments on new development to offset burdens on streets, schools, parks, and other public facilities. The burdens of beachfront development are no less severe just because

it takes place in piecemeal fashion, rather than all at once, as in a subdivision.

Appellants argue that the Commission may apply its public access requirement only after independent study of each proposed individual development. The Constitution has not previously been held to require state and local administrative agencies to justify appropriate zoning standards each time that an applicant seeks a building permit. To impose such a burden would severely hamper state and local government efforts to solve complex land use problems by legislative solutions to the cumulative impact of indivdual developments. In comparable circumstances, this Court has deferred to congressional reliance on the cumulative impact of individual actions as the basis of regulation.

The public access requirement does not deprive appellants of any meaningful property right. This Court has held that the public's free speech and petition rights justified a requirement of public access to a privately owned shopping center. The public's ownership of the tidelands similarly justifies the minimal access along the coast behind appellants' house so that the public may exercise its right to walk along the ocean shore. The right of passage extends, at most, to a ten-foot stretch of beach seaward of the seawall that protects appellants' privacy. Appellants have, in fact, permitted such traversing without objection for many years. Their philosophical disagreement with the Commission's action cannot give rise to a constitutional violation. Appellants themselves benefit from the public access condition that has been imposed on their neighbors because it permits appellants to walk along the full length of the beach.

Traditional notions of federalism, comity, and separation of powers dictate that this Court should respect the California Legislature's solution to the complex problems resulting from the increasing urbanization of the State's coastline. Appellants have not complained that the rem-

edy provided in the State's own courts for the alleged abuse of the police power is constitutionally inadequate, but only that they were not exempted from a generally applicable dedication requirement. The California Court of Appeal, which is familiar with local conditions and with the background and purpose of the Coastal Act, found that the legislative conditions were satisfied; its judgment is entitled to deference.

ARGUMENT

I. CALIFORNIA'S COASTAL ACCESS LEGISLATION EFFECTS A REASONABLE ACCOMMODATION OF COMPETING LAND USES.

A. The Public Owns The Tidelands And Is Entitled To Access To Them.

From earliest times, it has been commonly understood that those who build their houses on the shores of the sea do so subject to the public's right of access to the tidelands, which are held by the government in trust for all the people. The public trust doctrine [8] traces its lineage from ancient Roman law [9] and was developed to

[8] For excellent discussions on the evolution of the public trust doctrine from Roman times, see Stevens, *The Public Trust: A Sovereign's Ancient Prerogative Becomes the People's Environmental Right*, 14 U.C.D.L. Rev. 195 (1980); Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471 (1970), and Sax, *The Public Trust in Tidal Areas: A Sometime Submerged Traditional Doctrine*, 79 Yale L.J. 762 (1970).

[9] The *Institutes of Justinian* established that certain types of property were *res communes*, common to all the people and incapable of private ownership. These included running waters in the sea and the land beneath them. "[T]he shores are not understood to be property in any man, but are compared to the sea itself, and to the sand or ground which is under the sea." (T. Cooper trans. 1812); *id.* 2.1 at 67-68. Under the doctrine, the sovereign may dispose of its ownership rights in certain trust lands, *i.e.*, the *jus privatum*, but always retains a continuing obligation to manage trust lands for the public interest, the *jus publicum*. *See Shively v. Bowlby*, 152 U.S. 1 (1894).

ensure that the public could make use of the shore as a public highway. English common law embraced the doctrine [10]; and this Court early recognized that "[t]he shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845). Since then, this Court has repeatedly acknowledged that "[r]ights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law." *Borax Consolidated v. City of Los Angeles*, 296 U.S. 10, 22 (1935); *see also Illinois Central Railroad v. Illinois*, 146 U.S. 387 (1892).

California's Constitution affirms the State's obligation to protect the public's right of access to the tidelands. Article X, § 4 provides:

> No individual . . . possessing the frontage or tidal lands of a . . . navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose . . .; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof.

The public rights declared in the State Constitution were further explained in the 1972 Coastal Initiative adopted by the people of California. The Initiative recognized "that the California coastal zone is a distinct and valuable natural resource belonging to all the people and existing as a delicately balanced ecosystem" and directed all governmental agencies to develop a plan to "preserve, protect and where possible, to restore the resources of the coastal zone for the enjoyment of the

[10] *See Blundell v. Catterall*, 5 B. Ald. 268, 287, 106 Eng. Rep. 1190, 1197 (K.B. 1821) (Best, J., dissenting): "[T]he interruption of free access to the sea is a public nuisance. . . ."

BEST AVAILABLE COPY

current and succeeding generations." Cal. Coastal Zone Conservation Act of 1972, Cal. Pub. Res. Code § 27000 *et seq.* (superseded). A Coastal Plan was prepared pursuant to the Initiative's mandate; that plan recited that the constitutionally guaranteed public access was being lost, and set forth the policy that "[n]ew development shall provide public accessways to the shoreline except in those individual cases where it is determined that public access is inappropriate." [11] The Coastal Plan recommended that legislation be enacted to continue the access requirements of the Coastal Initiative. The Public Access Legislation at issue in this case implements this recommendation.

California is not alone in its efforts to protect the public's right of access to the tidelands. Many coastal states have articulated coastal access policies. At least six other jurisdictions have enacted legislation designed to secure public access to the beach.[12] In other States, the public's right of access to public trust lands has been recognized by the state courts. For example, in *Matthews v. Bay Head Improvement Assn.*, 95 N.J. 306, 325, 471 A.2d 355, 366, *cert. denied*, 469 U.S. 821 (1984), the New Jersey Supreme Court held that the public trust doctrine warranted public use of the dry sand area subject to an accommodation of the interests of the owner. The Florida Supreme Court has recognized that "[t]here is probably no custom more universal, more natural or more ancient, on the seacoasts, not only of the United States, but of the world, than that of bathing in the salt waters of the ocean and the enjoyment of the wholesome recreation incident thereto." *White v. Hughes*, 139 Fla. 54, 58-59, 190 So. 446, 448-49 (1939). That court, like

[11] California Coastal Plan, at 154 (December 1975) (hereinafter "Coastal Plan").

[12] North Carolina, Texas, Oregon, Hawaii, the Virgin Islands, and Guam. *See* Carmichael, *Sunbathers Versus Property Owners: Public Access to North Carolina Beaches*, 64 N.C.L. Rev. 159, 191-200 (1985), for a discussion of beach access legislation.

many others, observed that the shoreline is a "public highway." *Id.* at 58, 190 So. at 448.[13]

Federal law also encourages protection of public access to the coast. California's Coastal Plan was prepared with financial assistance from the Office of Coastal Zone Management under the provisions of the Federal Coastal Zone Management Act of 1972 (CZMA), which requires each coastal state to prepare such a plan. 16 U.S.C. § 1454 (a) (1) & (b) (7). California's plan, including the public access requirement, has been approved by the Secretary of Commerce. At least twenty-one other States have prepared coastal plans with beach access requirements pursuant to Section 1454 (b) (7) of the CZMA.[14] In addition, public access may be required as a condition for certain federal permits. See, *e.g.*, 33 C.F.R. §§ 320.4 (e), 320.4 (g) (2), 325.4 (a) (Corps of Engineers permit authority extends to safeguarding public access to navigable waters).

B. Public Access To The Tidelands Is Burdened By New Development On The Beach.

Development on the beach burdens the public's right of access to the tidelands and the ocean in numerous

[13] *See also State ex rel. Thornton v. Hay*, 254 Or. 584, 462 P.2d 671 (1969), holding that the public had established a recreational easement over private beach lands by customary use; *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 693, 249 S.E.2d 402, 408 (1978), upholding beach access legislation as reasonably related to "the special and urgent environmental problems" of the coastal area; *City of Daytona Beach v. Tona-Rama, Inc.*, 294 So.2d 73, 77 (Fla. 1974), holding that "[t]he beaches of Florida are of such a character as to use . . . as to require separate consideration from other lands . . . . The interest and rights of the public to the full use of the beaches should be protected."

[14] See Brower, "Beach Access Problems, Programs and Progress," in 2 *Coastal Zone '80* 1697 (B. Edge ed. 1980), *reprinted at* J.A. 123, 134.

ways. The specific development on appellants' property is particularly burdensome. As the photographic evidence shows, appellants' seawall physically prevents the public from using the tidelands during higher tides when the waves are breaking against the seawall. J.A. 262-64, 266; see also App. A-1, *infra*; J.A. 61, 68. During these times, small boats and surfers cannot land on the state-owned tidelands; and pedestrian access is completely blocked.

More generally, development diminishes the publicly owned tidelands by increasing erosion. Sandy beaches are created and diminished by natural coastal processes; and the works of man, such as the seawall in front of the appellants' house, may interfere with these processes by causing sand scour and exacerbating sand loss on this historically eroding beach.[15] The California Court of Appeal has, in another case, observed the physical law that seawalls " 'tend to cause a landward retreat of the mean high tide line, potentially affecting the boundary between public and private lands.' " *Whalers' Village Club v. California Coastal Comm.*, 173 Cal.App.3d 240,

---

[15] See, *e.g.*, U.S. Army Corps of Engineers, *Shore Protection Manual* (1984) 4-1 *et seq.* [Vol. 1, Ch. 4, entitled Littoral Processes]; *California's Battered Coast: Proceedings from a Conference on Coastal Erosion* (J. McGrath ed. 1985) [see especially studies cited at 41; Inman, *Budget of Sand in Southern California* at 10; Pilkey, *Are We Ready To Consider Shoreline Buildings As Being Expendable?* at 243 ("[Sea]walls built in New Jersey to save the property of a very small number of people have destroyed a recreational resource belonging to many people."); *id.* at 244 ("The shoreline of California is retreating, essentially everywhere, but at highly variable rates.")]; "Beach Erosion: Some Good News," *Sunset* 72, 73 (July 1986) ("as much as [one] million cubic yards [of sand] drifts past the coast at Ventura each year."); *Coastal Zone '85* (O. Magoon ed. 1985) [*e.g.*, Dolan, *Coast of California Storm and Tidal Waves Study*, Vol. I at 72; Holmberg, *Vanishing Beaches: Erosion Control & Public Policy*, Vol. II at 2078]; see also authorities cited at n.4 *supra*.

260, 220 Cal.Rptr. 2, 13 (1985), *cert. denied*, 106 S.Ct. 1962 (1986) (citation omitted).

Development along the shoreline may also block the public's visual access to the sea. The large permanent residences that are replacing the small vacation cottages along this beach are radically changing the character of the area and creating an unbroken wall between the public and its tidelands. J.A. 60. In some areas of California and elsewhere along our nation's coast, one can drive for miles without realizing that the ocean is in the backyards of a string of houses. See government documents cited at J.A. 65; J.A. 161, 165. On the tidelands themselves, public access to sunlight is reduced through increased building heights and resulting shadows.

New development on the beach also burdens public access because people are intimidated from using the tidelands in close proximity to private residences. J.A. 61. As a result, the public is channeled to other, already over-crowded public trust lands. Near the public beaches, the use of streets intensifies and traffic activity increases; beach parking and other public facilities are overtaxed. J.A. 58-59.

These burdens are imposed on the public whether the scale of the development is large or small, whether for single- or multi-family use. California courts have taken judicial notice of burdens created by new development along the coast, with particular sensitivity to their cumulative effect. For example, in *Grupe v. California Coastal Comm.*, 166 Cal.App.3d 148, 167 n.12, 212 Cal.Rptr. 578, 589 n.12 (1985) (citations omitted), the court noted:

> Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to increase since approximately 85 percent of California's population lives within 30 miles of the coast. . . .

As noted by our Supreme Court, "[i]n recent decades, the People of California have become painfully aware of the deterioration in the quality and availability of recreational opportunities along the California coastline due to the combined factors of an increasing demand for its use and the simultaneous decreasing supply of *accessible land* in the coastal zone." . . . The ballot argument in support of the California Coastal Initiative appealed to this "painful awareness" when it stated: "'Our coast has been plundered by haphazard development and land speculation. Beaches formerly open for camping, swimming, fishing and picnicking are closed to the public.'" . . .

The California Court of Appeal has also warned that development along the coast is creating a wall between the People of California and the tidelands: "'The deleterious consequences of haphazard community growth in this state and the need to prevent further random development are evident to even the most casual observer.' This is particularly true of our 1,000-mile coastline. Visual, as well as physical, access to large segments of our beaches has been obstructed by residential, commercial and industrial development."

C. The Public Access Legislation Is A Proper Exercise Of The Power To Zone.

The people of California observed these burdens and others on the public's right of access to the state-owned tidelands and adopted the Coastal Initiative in response. The evidence was documented by the authors of the Coastal Plan and relied on by the Legislature in enacting the Public Access Legislation. The concept of the tidelands as a public highway invokes horn book law teaching that it is a nuisance to obstruct a public way.[16]

[17] See, *e.g.*, Cal. Civ. Code § 3479; 78 Am. Jur. 2d, *Obstruction of, or Interference with, Waters or Navigation* § 96 (1975) (navigable waters constitute public highways; unauthorized obstruction a public nuisance); 64 C.J.S. *Municipal Corporations* § 1744 (1950). *Cf. White v. Hughes*, 139 Fla. at 58, 190 So. at 448 (shoreline is a public highway).

The California Coastal Act can thus be seen as a traditional exercise of the police power to regulate activities that may harm the public interest. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365, 387-88 (1926); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887).

Moreover, special treatment of the coastal zone has been repeatedly held a valid legislative classification under state and federal law.[17] Comprehensive planning to resolve the intense land use conflicts and protect this vanishing resource is encouraged by the CZMA. 16 U.S.C. §§ 1451(i) & (j), 1452(2) & (4), 1454. In implementing the State's responsibilities under the public trust doctrine, the Public Access Legislation reflects both the mandate of California's Constitution and federal law. On its face, the legislation discloses a balancing of public and private interests. California Pub. Res. Code § 30210 provides: "In carrying out the requirement of . . . the California Constitution, maximum access . . . shall be provided for all the people consistent with . . . the need to protect public rights, rights of private property owners, and natural resource areas from overuse." Section 30214, the legislative direction regarding the implementation of the public access policies, mandates that the Coastal Commission take into account "the privacy of adjacent property owners" and carry out the access policies "in a reasonable manner that considers the equi-

[17] *Secretary of Interior v. California*, 464 U.S. 312, 315-17 (1984); *Marquez-Colon v. Reagan*, 668 F.2d 611 (1st Cir. 1981); *James v. Inhabitants of the Town of West Bath*, 437 A.2d 863 (Me. 1981); *Lusardi v. Curtis Point Prop. Owners Assn.*, 86 N.J. 217, 430 A.2d 881 (1981); *Skagit Cty. v. State, Dept. of Ecology*, 93 Wash.2d 742, 613 P.2d 115 (1980).

ties and that balances the rights of the individual property owner with the public's constitutional right of access." Section 30010 prohibits application in a manner that would constitute an uncompensated taking of private property.[18]

The California courts, interpreting this legislation and particularly its balancing requirement, have held that "a finding of new development does not automatically impose a public access condition." *Whalers' Village Club*, 173 Cal.App.3d at 259, 220 Cal.Rptr. at 13. *See also Georgia-Pacific Corp. v. California Coastal Comm.*, 132 Cal.App.3d at 678, 701, 183 Cal.Rptr. 395, 409 (1982). Under the statutory scheme, projects that present little adverse impact on coastal resources are specifically exempt or may qualify for waiver. *See Whalers' Village Club*, 173 Cal.App.3d at 258, 220 Cal.Rptr. at 12.

When the Public Access Legislation is examined in its historical context and in its entirety, it clearly appears to be an intelligent compromise necessary to resolve intense land use conflicts that arise because of the nature of coastal property. In that respect, it is like other resource and historical preservation legislation. *See, e.g., Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978).

The public access requirement is also like the more familiar conditions imposed by local governments on new development to offset burdens on streets, schools, parks, and other public facilities. *See, e.g., Creative Environ-*

---

[18] Section 30010 would appear to provide an adequate state remedy under *Parratt v. Taylor*, 451 U.S. 527 (1981), and *Hudson v. Palmer*, 468 U.S. 517 (1984). *See MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561 (1986); *Williamson Cty. Reg'l Plan. Comm. v. Hamilton Bank*, 105 S.Ct. 3108 (1985).

ments, Inc. v. Estabrook, 491 F.Supp. 547 (1980), *aff'd*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); *Aunt Hack Ridge Estates, Inc. v. Planning Comm. of Danbury*, 160 Conn. 109, 273 A.2d 880 (1970); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673 (1966); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). The tidelands are comparable to a sidewalk, a street, or an alley. If development in the coastal zone occurred all at once as it does in a subdivision, the required dedication would be commonplace. The only reason why the dedication requirement appears different, and the basis on which it is challenged in this case, is that the Commission must proceed in piecemeal fashion because the development does not occur all at once. *See Grupe*, 166 Cal.App.3d at 170, 212 Cal.Rptr. at 592. The burdens, however, are no less severe.

Appellants' property cannot be viewed in isolation from the property of their neighbors along the shore. All property owners in the development area are placed under the same restrictions for their mutual benefit as well as the general public interest. *See Agins*, 447 U.S. at 262.[19] Appellants share with other coastal property owners the benefits and burdens of the State's exercise of its police power. The scope of that police power is clearly broad enough to encompass this legislation as traditional zoning to prevent a nuisance (*see Euclid*; *Mugler*); or modern zoning for resource protection (*see Agins*), for historical preservation (*see Penn Central*), or to protect the quality of life (*Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

---

[19] Because the Public Access Legislation has general applicability, it does not raise the concerns that a more limited or sporadic application might. *See Penn Central*, 438 U.S. at 138-40 (Rehnquist, J., dissenting).

II. APPELLANTS' PROPERTY HAS NOT BEEN TAKEN.

A. The Coastal Commission Should Not Be Required To Prove The Constitutionality Of The Legislation Each Time That It Is Applied.

The validity of the Coastal Act, the general law at issue in this case, and of the Public Access Legislation in particular, is not, and could not be, seriously questioned. It is supported by the California Constitution, the public trust doctrine, centuries of experience, and a wealth of studies. The people of California, who adopted the Coastal Initiative, and the State Legislature which implemented it by the public access requirement, determined, on the basis of substantial evidence, that new development along the coast individually and cumulatively burdens public lands and facilities. They adopted specific development standards for the coastal zone, taking into account the public's right of access, the need to protect the resource, and private property rights. The questions whether the development creates the need for the access condition and whether the developers proportionately benefit from a coastal permit have been addressed by the legislation, which provides the evidentiary nexus between the benefits to the developer and the burden on the public created by new development.

This Court has confirmed the constitutionality of general zoning legislation based upon experience that demonstrates that activities of certain types cumulatively result in an adverse impact on the surrounding environment. *See, e.g., Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Such legislation has been upheld even against a claim of infringement of fundamental constitutional rights.[20] In *City of Renton v. Playtime Theatres,*

[20] Appellants had nc vested property right under state law to build their new house, *see Avco Community Developers, Inc. v. South Coast Reg'l Comm.*, 17 Cal.3d 785, 132 Cal.Rptr. 386 (1976); and therefore the requirement that they obtain a coastal permit imposed no unconstitutional condition. *See Board of Regents v. Roth*, 408 U.S. 564 (1972).

Inc., 106 S.Ct. 925, 930 (1986), the Court held the local government was not required to conduct new studies or produce independent evidence to justify a general zoning restriction on the location of adult movie houses; such a requirement imposed "an unnecessarily rigid burden of proof" on the City.

To require a *de novo* evidentiary hearing and a balancing of the burdens and benefits of a particular development each time that a legislative condition is applied would severely hamper state and local government efforts to solve complex land use problems. Eighty-eight percent of all communities in the United States require some form of land dedication in connection with development approvals. See Purdum and Frank, "Community Use of Exactions: Results of a National Survey" in *Development Exactions* ch. 4-3 (Frank and Rhodes ed. 1986). Such requirements rest on the cumulative impact of development and seek a general solution.[21]

[21] See generally Annot., 43 A.L.R.3d 862, 865-66 (1972) [Subdivided Land, Dedication for Recreation], summarizing the prevailing rule that state and local enactments that require "dedication of land for park and recreational purposes have been held valid, both as falling within the general police power, or (in the case of local enactments) the specific standards of enabling legislation, or both, and as not violating prohibitions against confiscation . . . . The philosophical rationale [for these enactments is] that the combination of the growth of population and the shrinkage of open space justifies compulsory planning for preservation of recreation space, without the necessity of justifying the particular application upon the needs specifically created by an individual builder." *See, e.g., Billings Properties, Inc. v. Yellowstone Cty.*, 144 Mont. 25, 35, 394 P.2d 182, 188 (1964) (state authorizing legislation sufficient to satisfy the need); *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979) (court took judicial notice of the fact that development creates the need).

Appellants contend that each time that the public access requirement is applied, the Commission must make a new study and demonstrate by empirical evidence a "direct and definable adverse impact on public access" (Br. 34).[22] Administrative agencies are not generally required to prove the constitutionality of zoning standards or other regulatory conditions, such as set-backs, height limitations, and building codes, every time that an applicant seeks a building permit. *See Euclid*, 272 U.S. at 388-89; *United States v. Locke*, 471 U.S. 84 (1985).

The federal government frequently regulates individual activity because of the cumulative impact that the individual and others engaged in similar activity may have on federal interests. In *Wickard v. Filburn*, 317 U.S. 111, 127-28 (1942), the Court upheld the application of a marketing quota to a small farmer, stating: "That [his] own contribution to the demand for wheat may be trivial by itself is not enough to remove him from the scope of federal regulation where, as here, his contribution, taken together with that of many others similarly situated, is far from trivial." The Court deferred to the legislative judgment about which producers should be exempt,[23] noting (*id.* at 129; footnote omitted) that

> [i]t is of the essence of regulation that it lays a restraining hand on the self-interest of the regulated and that advantages from the regulation commonly fall to others. The conflicts of economic interest between the regulated and those who advantage by it are wisely left under our system to resolution by the Congress under its more flexible and responsible legislative process. Such conflicts rarely lend themselves to judicial determination. And with the wisdom, workability, or fairness, of the plan of regulation we have nothing to do.

[22] *Amici* agree with appellee that such evidence is present in this case, but we contend that it is unnecessary.

[23] The statutory scheme in this case similarly provides for exemptions for development that has minimal impact on the coast. *See supra* at 15-16.

In numerous other contexts, Congress has relied on cumulative impact as the basis of regulation; and this Court has upheld that judgment. *See, e.g., Perez v. United States*, 402 U.S. 146 (1971) (criminal penalties for loan sharking); *Katzenbach v. McClung*, 379 U.S. 294 (1964) (civil rights legislation). The federal Superfund program, for example, is based not on the impact of any particular producer or any particular type of hazardous waste, but on the increasing awareness that the cumulative impact of hazardous waste disposal severely and adversely affects the public interest. All producers of hazardous waste are now required to contribute to the Superfund clean-up program. See 26 U.S.C. §§ 4611, 4661, 4681; 42 U.S.C. § 9631.

The problem addressed by the public access requirement of the California Coastal Act bears a fundamental similarity to the problem faced by the federal government in the Superfund program. In each instance, the program seeks to counteract the cumulative impact of individual actions, whose separate effects on the resource that is the focus of the government's concern are exceedingly difficult to assess. Because the public access requirement is a valid measure to address the problem in the aggregate, the Commission should not be required to present independent evidence to prove the constitutionality of its application to each new development.

B. The Public Access Requirement Does Not Deprive Appellants Of Reasonable Value Or Use Of Their Property Or Any Reasonable Expectation To Exclude The Public.

Even if a case-by-case justification were required, the public access condition as applied to appellants would be valid. Purchasers of beach-front property must realize

by now that "[o]wnership does not always mean absolute dominion." *Marsh v. Alabama*, 326 U.S. 501, 506 (1946). Property rights "are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *see State Land Board v. Corvallis Sand & Gravel Co.*, 429 U.S. 363 (1977). "Rights and interests in the tideland, which are subject to the sovereignty of the State, are matters of local law." *See Borax*, 296 U.S. at 22.

Since early statehood, California has defined the public's right of access to public trust lands in its Constitution, legislation, and judicial decisions. Owners of property abutting public trust land correspondingly have acquired such property with knowledge that they may not exclude the public. This particular "stick" of property ownership has never been part of the "bundle" of coastal property rights. This Court has often stated the well-established rule that "a State in the exercise of its police power may adopt reasonable restrictions on private property so long as the restrictions do not amount to a taking without just compensation or contravene any other federal constitutional provision." *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 81 (1980), *citing Euclid* and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976).

In *PruneYard*, this Court held that requiring public access to a shopping center so that the public could exercise its rights under the California Constitution to free expression and petition did not violate the owners' Fifth Amendment or due process rights. Just like the guarantees of free expression at issue in *PruneYard*, California's Constitution guarantees public access to state-owned tidelands. The reasoning of *PruneYard* is fully applicable to this case.

This Court observed in *PruneYard* that States have the right under their own constitutions to grant "individual liberties more expansive than those conferred by the Federal Constitution." 447 U.S. at 81. Finding that "there has literally been a 'taking' of [a property] right to the extent that the California Supreme Court has interpreted the State Constitution to entitle its citizens to exercise free expression and petition rights," the *PruneYard* Court noted that " 'not every destruction or injury to property by governmental action has been held to be a "taking" in the constitutional sense.' " *Id.* at 82-83 (footnotes and citation omitted). The Court then analyzed the takings claim according to (1) the character of the governmental action, (2) its economic impact, and (3) its interference with reasonable investment-backed expectations. The Court found that public access did not unreasonably impair the value or use of the property as a shopping center, and it therefore held that the requirement of access to shopping center property in the exercise of the state-protected rights of free expression and petition did not amount to a taking. *Id.* at 83, 84.

Like the public access required in *PruneYard*, the public access requirement in this case does not unreasonably impair the value of appellants' property for its intended use as a residence.[24] The public access is limited to passing along at most a ten-foot stretch of beach seaward of the existing seawall, which is over eight feet high and thus fully protects appellants' privacy. The history of this property shows that appellants could not have formed a reasonable expectation of excluding the public from the

---

[24] In fact, public access does not impair the value or use at all. The rocky area seaward of appellants' seawall is periodically covered with water and not suitable for any continuous private use or cultivation. *See Borax*, 296 U.S. at 25; *Tona-Rama*, 294 So.2d at 77 ("The sandy portion of the beaches are of no use for farming, grazing, timber production, or residency—the traditional uses of land—but has served as a thoroughfare and haven for fisherment and bathers, as well as a place of recreation for the public.").

beach. *See Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005-08 (1984). The record shows that the public has been crossing this property for many years (J.A. 85) and that appellants do not in fact object to the public's access. Their objection reflects only a philosophical disagreement with the Coastal Commission over what the law requires. J.A. 313; Br. 12.

This case bears no resemblance to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), in which the owners had taken no action in an area regulated by the State. Here, appellants' application for a coastal permit triggered the police power to regulate the development. Appellants had no vested right under California law to build their new large house without a coastal permit. *See Avco Community Developers, Inc. v. South Coast Regional Comm.*, 17 Cal.3d 785, 132 Cal. Rptr. 386 (1976). They chose not to take advantage of their right to replace the existing structure or to build a house up to ten percent larger than the existing structure free of the access requirement. See Cal. Pub. Res. Code § 30212.

This case is also quite different from *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), in which the Army Corps of Engineers first told the developers that they were not required to obtain permits to develop a private marina. Then, after the improvements were finished, the government told the owners that they could not exclude the public. This Court held that the government's belated assertion of jurisdiction impermissibly interfered with reasonable investment-backed expectations. Significantly, the Court stated: "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures it deemed appropriate for the promotion of navigation." *Id.* at 179. In this case, appellants

purchased their property with full knowledge of the public access requirements for coastal development permits. In *Kaiser Aetna*, the Court also noted that, prior to the dredging, the pond was separated from navigable waters by a natural barrier beach and was always considered private under state law. *Id.* at 178, 179. By contrast, appellants' property is immediately adjacent to public tidelands (the seawall may even intrude onto such lands).

In short, none of the elements of a taking is present in this case. The character of the governmental action is merely the implementation of the constitutional policy of protecting public access to the tidelands; the so-called "physical invasion" is nothing other than the continuation of a long-established custom along this beach and others like it. The interference with private property rights is negligible. Appellants have built their house. It is separated by a high seawall from the tidelands, which appellants could not use for private purposes in any event. There is no adverse economic impact; in fact, appellants receive reciprocal benefits from the public access condition because they are able to walk along the full length of this shore. And there has been no interference with any reasonable investment-backed expectations because appellants purchased the property with full knowledge of the public access requirement.

III. THIS COURT SHOULD NOT SIT AS A SUPREME BOARD OF ZONING ADJUSTMENT.

The *Gorieb* Court recognized in 1927 that "[a]ll [zoning restrictions] rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life." 274 U.S. at 608. Sixty years later, the urbanization of once rural beaches presents more complex, but not fundamentally different, problems than the increasing urban-

ization of the cities. Thus, the observation of the *Gorieb* Court in rejecting the claim that the set-back ordinance constituted a taking of property, serves equally to defeat appellants' claim (*id.* at 608):

> State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.

The Court has consistently adhered to this fundamental principle of separation of powers. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 469 (1981) ("[W]e reiterate that it is up to legislatures, not courts, to decide on the wisdom and utility of legislation."); *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 240-43 (1984); *Renton*, 106 S.Ct. at 931 ("'[T]he city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.'") (citing *Young v. American Mini Theatres*, 427 U.S. at 71).

The *Gorieb* Court also followed well-established principles of federalism and comity by deferring to the judgment of the state court, stating (274 U.S. at 609):

> The highest court of the state, with greater familiarity with the local conditions and facts upon which the ordinance was based than we possess, has sustained its constitutionality; and that decision is entitled to the greatest respect and, in a case of this kind, should be interfered with only if in our judgment it is plainly wrong.

Plainly, the land use conflicts created by new development along the coast are complex, as more than a decade of efforts by state and local governments to devise acceptable coastal zone management plans attests. The judgment of the California courts, which have been interpreting the Coastal Act for many years, that the public access requirement is constitutional, should not be disturbed. Lower federal courts, which are regularly presented with challenges to the Coastal Act and other state and local planning decisions, have wisely held that "[f]ederal courts must be wary of intervention that will stifle innovative state efforts to find solutions to complex social problems." *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092 (9th Cir. 1976); *see Construction Industries Assn. of Sonoma County v. City of Petaluma*, 522 F.2d 897, 906 (9th Cir.), *cert. denied*, 424 U.S. 934 (1976).

Appellants invite this Court to sit as a supreme board of zoning adjustment. It is an inappropriate role for this Court. *See Euclid*, 272 U.S. at 395; *Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928).

CONCLUSION

For the foregoing reasons, the judgment of the California Court of Appeal should be affirmed.

Respectfully submitted,

KATHERINE E. STONE
BURKE, WILLIAMS
& SORENSEN
624 South Grand Avenue
Suite 1100
Los Angeles, CA 90017
(213) 623-1900
Of Counsel

BENNA RUTH SOLOMON *
Chief Counsel
JOYCE HOLMES BENJAMIN
STATE AND LOCAL LEGAL CENTER
444 North Capitol Street, N.W.
Suite 349
Washington, D.C. 20001
(202) 638-1445

* *Counsel of Record for the* Amici Curiae

February 6, 1987

BEST AVAILABLE COPY

APPENDIX

KEN LUBAS/Los Angeles Times

HIGHEST TIDE IN 20 YEARS—Wave explodes against the seawall at Faria Beach near Ventura Tuesday. A rare alignment of Earth, moon and sun will continue to cause high tides today, but little damage is expected.

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

(10)

No. 86-133

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN AND
MARILYN HARVEY NOLLAN,
Appellants,

VS.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF OF DESIGNATED CALIFORNIA CITIES AND COUNTIES AS AMICI CURIAE IN SUPPORT OF APPELLEE

E. CLEMENT SHUTE, JR.
(Counsel of Record)
ALLETTA D'A. BELIN
FRAN M. LAYTON
SHUTE, MIHALY & WEINBERGER
396 Hayes Street
San Francisco, CA 94102
(415) 552-7272

Attorneys for Amici Curiae
California Cities
and Counties

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

35 pp

AMICI CURIAE
CALIFORNIA CITIES AND COUNTIES:

Cities

Belvedere
Benicia
Berkeley
Commerce
Concord
Corte Madera
Danville
Davis
Del Rey Oaks
Duarte
Escondido
Fairfax
Fairfield
Hayward
Lafayette
Laguna Beach
Los Angeles
Los Gatos
Madera
Marina
McFarland
Mill Valley
Modesto
Moraga
Morro Bay
Newport Beach
Orinda
Pittsburg
Pomona
Rancho Mirage
Redding
Roseville
Sacramento
San Bernardino
San Buenaventura
San Francisco
San Jose
San Leandro
San Luis Obispo
San Rafael
Santa Barbara
Sausalito
Tehachapi
Tiburon
Tulare
Visalia

Counties

Alameda
Marin
Monterey
San Francisco
Santa Cruz
Sonoma

County Supervisors Association of California

TABLE OF CONTENTS

Page

Interest of the Amici Curiae 1
Summary of Argument 2
Argument 3

I

Since There Has Been No Infringement of the Nollans' Reasonable Investment-Backed Expectations and Since the Economic Impact of the Public Access Dedication Requirement Is Minimal, No Taking Has Occurred 3
A. Courts Examine Several Factors to Determine Whether An Unconstitutional Taking Has Occurred 3
B. There Was No Taking Since There Has Been No Infringement of the Nollan's Reasonable Investment-Backed Expectations 5
C. There Was No Taking Because the Coastal Commission Permit Condition Had Little or No Economic Impact Upon the Nollans 9

II

The Coast Commission's Requirement That the Nollans Allow Lateral Public Access Across the Beach as a Condition to the Permit Allowing the Nollans to Build a New House Is Not a Physical Invasion of the Property 11
A. Because the Nollans Were Free to Continue Using, Repairing, Maintaining, and Improving Their House Without Ever Being Subject to a Public Access Requirement, There Was No Physical Invasion 12
B. Exactions Required as a Condition to Subdivision or Development Permits Are Like Other Zoning Regulations and Should Be Subject to the Same Taking Test 14

TABLE OF CONTENTS

Page

III

Even If the Court Finds That This Case Involves a Physical Invasion, Since It is Not a Permanent Physical Occupation, the Traditional Taking Analysis, Rather Than a Per Se Rule, Applies 17

A. Since the Invasion Resulting from the Required Pubic Access Dedication Is Occasional and Sporadic, the Traditional Taking Analysis Applies 17

B. If a Per Se Taking Rule Were Applied in This Case, It Would Have to Be Applied to Virtually Any Dedication Requirement; Such a Holding Would Drastically Curtail the Ability of Governments to Regulate Land Use For the Public Benefit 18

1. How Dedications and Exactions Are Used in California 18

2. The Effect of Finding the Nollans' Permit Condition a Per Se Taking 20

IV

Imposition of the Permit Condition Was a Reasonable Exercise of the Police Power Since There Was a Rational Relationship Between the Permit Condition and a Legitimate Governmental Objective 21

A. The Constitution Requires a Rational Relationship Between the Permit Condition and Legitimate Governmental Interest 21

B. There Is No Constitutional Basis For Requiring More Than A Rational Relationship Between the Permit Condition and Legitimate Government Objectives .. 22

Conclusion 25

TABLE OF AUTHORITIES CITED

Cases

Page

Agins v. City of Tiburon, 447 U.S. 255 (1980) 4, 9, 23

Andrus v. Allard, 444 U.S. 51 (1979) 3

Armstrong v. United States, 364 U.S. 40 (1960) 3

Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California, 346 U.S. 346 (1953) 24

Connolly v. Pension Benefit Guaranty Corp., 106 S.Ct. 1018 (1986) 3

Construction Industry Association, Sonoma County v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied* 424 U.S. 934 (1976) 22

Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) 22

Goldblatt v. Hempstead, 369 U.S. 590 (1962) 5, 21, 22

Gorieb v. Fox, 274 U.S. 603 (1927) 5, 16, 22

Hadacheck v. Sebastian, 239 U.S. 394 (1915) 4, 16, 22

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 6, 14, 17, 18

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 5, 13, 17

MacDonald, Sommer & Frates v. Yolo County, 106 S.Ct. 2561 (1986) 4

Miller v. Schoene, 276 U.S. 272 (1928) 5, 22

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 21

Nashville, Chattanooga & St. Louis Railway v. Walters, 294 U.S. 405 (1935) 24

Norwood v. Baker, 172 U.S. 269 (1898) 24

Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) 24

Park Avenue Tower Associates v. City of New York, 746 F.2d 135 (2d Cir. 1984) 5

Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978) 4, 5

Table of Authorities Cited

Cases

Page

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) ... 3
Perry v. Sindermann, 408 U.S. 593 (1972) 25
Pumpelly v. Green Bay Co., 13 Wall. 166 (1872) 13, 17
Rogin v. Bensalem Township, 616 F.2d 680 (3d Cir. 1980), *cert. denied,* Mark-Garner Associates, Inc. v. Bensalem Township, 450 U.S. 1029 (1981) 21
Ruckelshaus v. Monsanto, 467 U.S. 986 (1984) 4, 6, 7, 8, 9, 21
Sadowsky v. City of New York, 732 F.2d 312 (2d Cir. 1984) 5
United States v. Carolene Products, 304 U.S. 144 (1983) 21
United States v. Causby, 328 U.S. 256 (1946) 13
United States v. Pewee Coal Co., 341 U.S. 114 (1951) ..13, 17
Welch v. Swasey, 214 U.S. 91 (1909) 5
William C. Haas Co. v. City of San Francisco, 605 F.2d 1117, (9th Cir. 1979), *cert. denied,* 445 U.S. 928 (1979) 5, 16
Williamson v. Lee Optical Co., 348 U.S. 483 (1955) 21, 23
Williamson County Regional Planning Commission v. Hamilton Bank, 106 S.Ct. 3108 (1985) 6

Constitution

U.S. Constitution, Fifth Amendment 3
California Constitution, article X section 4 20

Statutes

Cal. Bus. & Prof. Code § 11535 19
Cal. Gov. Code:
§ 66475 19
§ 66475.1 19
§ 66475.2 19
§ 66475.3 .....16, 19
§§ 66477, 66478 and 66479 19

Table of Authorities Cited

Cases

Table of Authorities Cited

Statutes

Page

§ 66478.4 20
§ 66478.5 20
§ 66478.11 20
§ 66478.12 20
§ 66483 19
§ 66484 19
§ 66484.5 19
Cal. Pub. Res. Code:
§ 30000 et seq. 2
§ 30212 .....8, 12, 13, 20, 23
§ 30001.5 .....23, 24
§ 30210 24
§ 30211 23

Other Authorities

Bosselman and Stroud, Pariah to Paragon: Developer Exactions in Florida, 1975-85, 14 Stetson L. R. 527, 528 (1985) 18, 19
Heyman and Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exaction," 73 Yale L. J. 1119, 1137 (1964) 15, 18

No. 86-133

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN AND
MARILYN HARVEY NOLLAN,
Appellants,

VS.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

BRIEF OF DESIGNATED CALIFORNIA CITIES AND COUNTIES AS AMICI CURIAE IN SUPPORT OF APPELLEE

INTEREST OF THE AMICI CURIAE

At issue in this case is the constitutionality of a California Coastal Commission permit condition requiring dedication of an easement for lateral public access along the beach in front of appellants' home. The forty-six California cities, six California counties and the County Supervisors Association of California which have joined together as amici curiae[1] have a substantial interest in the enforcement of the California Coastal Act of 1976.

[1] Pursuant to Rule 36 of the Rules of this Court the parties have consented to the filing of this brief. The parties' letters of consent have been filed with the Clerk of the Court.

Cal. Pub. Res. Code § 30000 et seq. In addition, amici curiae, as well as other local governments in this state and other states, routinely employ dedications as a way of allocating a portion of the costs associated with new or intensified development to project applicants. It is plain that the Court's decision in this case may affect amici curiae's continued ability to regulate land use for the benefit of the public.

SUMMARY OF ARGUMENT

There was no taking in the instant case. Nor was there an unconstitutional exercise of the police power. Dedication requirements, such as the Coastal Commission permit condition at issue in this case, are subject to the same constitutional analysis as any other governmental action.

The Nollans bought the property and built the new house after the enactment of the statute specifying the conditions for public access easements. They voluntarily committed themselves to the public access requirement and thus there was no infringement of their reasonable investment-backed expectations. Likewise, the permit condition had little or no economic impact upon the Nollans because the statutory conditions for public access were imposed before they purchased the property, and thus were reflected in the purchase price. For these reasons there can be no taking in this case.

The Commission's public access condition is not a physical invasion of the Nollans' property. Like zoning designations, setback requirements and land use permits, the condition is a regulation of the use of real property. A finding by this Court that dedication requirements are either permanent physical occupations or lesser physical invasions subject to stricter scrutiny than other regulatory actions is legally unsupportable and would have drastic implications. Dedication requirements, which have long been an important tool in local and state government land use systems, would be all but eliminated and the scope of the police power correspondingly reduced.

Finally, the Commission's permit requirement is rationally related to legitimate governmental interests in maximizing public

access to the shore. Thus, the Commission's action is a constitutional exercise of the police power. To impose the public access condition on the Nollans' permit does not intrude upon constitutionally protected property rights.

ARGUMENT

I

SINCE THERE HAS BEEN NO INFRINGEMENT OF THE NOLLANS' REASONABLE INVESTMENT-BACKED EXPECTATIONS AND SINCE THE ECONOMIC IMPACT OF THE PUBLIC ACCESS DEDICATION REQUIREMENT IS MINIMAL, NO TAKING HAS OCCURRED.

A. Courts Examine Several Factors to Determine Whether an Unconstitutional Taking Has Occurred.

The Fifth Amendment guarantees that private property shall not "be taken for public use, without just compensation." This Court has recognized that the "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). At the same time, as the Court stated in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922), "[g]overnment hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." The Court subsequently reinforced this point in *Andrus v. Allard*, 444 U.S. 51, 65 (1979):

> [G]overnment regulation—by definition—involves the adjustment of rights for the public good. Often this adjustment curtails some potential for the use of economic exploitation of private property. To require compensation in all such circumstances would effectively compel the government to regulate by *purchase*.

(Emphasis in original.) Most recently, in *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. 1018, 1025 (1986), the Court pointed out that "Congress routinely creates burdens for some

that directly benefit others [without violating the Fifth Amendment]."

To determine whether a governmental action has effected an unconstitutional taking, the Court examines three factors of particular significance: (1) the extent to which the government action interferes with reasonable investment-backed expectations; (2) the economic impact of the government regulation; and (3) the character of the government action, i.e., whether there is a physical invasion. *MacDonald, Sommer & Frates v. Yolo County*, 106 S.Ct. 2561, 2566 (1986).[2]

With respect to the first factor, where the Court finds that there clearly were no reasonable investment-backed expectations whatsoever, it need not look further. There is no unconstitutional taking. *Ruckelshaus v. Monsanto*, 467 U.S. 986, 1005 (1984). And even where there may have been some interference with investment-backed expectations, there still may be no taking. See *Connolly v. Pension Benefit Guaranty Corp.*, 106 S.Ct. at 1027.

With respect to the second factor, economic impact of the regulation, although the Court has never specified exactly what would need to be shown to establish a taking, it is clear what does not establish a taking. For example, severe diminutions in value do not suffice to establish a taking. See *Hadacheck v. Sebastian*, 239 U.S. 394, 405 (1915) (no taking despite diminution in value from $800,000 to a maximum of $60,000 and property could not be used for any purpose permitted under city's ordinance);

[2] The Court, in other cases of governmental regulation, has set forth a related standard to determine whether a regulatory taking has occurred. A taking occurs when the regulation either does not substantially advance legitimate state interests or denies an owner any economically viable use of land. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980) (citing *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 138 n. 36 (1978)). Under this formulation of the rule, the question of economic viability incorporates the first two parts of the more general taking analysis—reasonable investment-backed expectations and economic impact of the regulation. This test omits the third prong of the test, reflecting the fact that regulatory actions do not constitute physical invasions. (*See* §§ II and III, *infra*.)

William C. Haas Co. v. City of San Francisco, 605 F.2d 1117, 1120-1121 (9th Cir. 1979), cert. denied, 445 U.S. 928 (1979) (no taking where value of property diminished from about $2,000,000 to about $100,000). See, e.g., *Miller v. Schoene*, 276 U.S. 272 (1928); *Gorieb v. Fox*, 274 U.S. 603, 608 (1927); *Welch v. Swasey*, 214 U.S. 91 (1909); *Goldblatt v. Hempstead*, 369 U.S. 590, 592-93 (1962). Nor does a property owner have a constitutional right to recover his investment in his property. *Park Avenue Tower Associates v. City of New York*, 746 F.2d 135, 139 (2d Cir. 1984) (quoting Sadowsky v. City of New York, 732 F.2d 312, 317 (2d Cir. 1984)).

Another important factor relating to both economic impact and reasonable investment-backed expectations is whether the challenged regulation allows the property owner to continue the existing use of the property. *See Penn Central, supra*, 438 U.S. at 136. A regulation which does so is highly unlikely to constitute a taking.

Finally, analyzing the third factor, the Court will take into account whether the regulation causes a physical invasion of property:

> A "taking" may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (quoting *Penn Central, supra*, 438 U.S. at 124). Actual permanent and exclusive physical occupation of property by the government or under government authority is a taking per se. *Id.*

B. There Was No Taking Since There Has Been No Infringement of the Nollans' Reasonable Investment-Backed Expectations.

One of the most critical questions in determining whether a taking has occurred is the extent to which the challenged government action interfered with plaintiff's reasonable investment-

backed expectations. See *Williamson County Regional Planning Commission v. Hamilton Bank*, 106 S.Ct. 3108, 3119 (1985). Where a property owner has made large investments implementing a lawful use of his property in reliance upon governmental approvals or assurances, there can be an interference with reasonable investment-backed expectations, and a taking may have occurred. *Kaiser Aetna v. United States*, 444 U.S. 164, 179-180 (1979).

Kaiser Aetna v. United States, supra, is the only case where this Court has explicitly found both interference with reasonable investment-backed expectations and a taking. In *Kaiser Aetna*, Kuapa Pond was converted into a marina by connecting it to the adjacent bay. The owner did so only after requesting approval from the Army Corps of Engineers and receiving assurance from the Corps that no permits were necessary. In reliance on such assurances, the owner invested millions of dollars in improvements to the marina and surrounding area. Subsequently, the United States claimed that because Kuapa Pond had become a navigable water, the public had a right of access on the pond. The Court held that if the Government were to open the pond up to the public, it would be an unconstitutional taking.

In *Kaiser Aetna*, the company had invested millions of dollars in improvements on the assumption that Kuapa pond was privately owned and in reliance upon the Government's assurances that such investments were lawful. These factors were critical to the Court's holding. 444 U.S. at 169. The Court stated:

> [I]f the Government wishes to make what was formerly Kuapa Pond into a public aquatic park *after petitioners have proceeded as far as they have here*, it may not, without invoking its eminent domain power and paying just compensation, require them to allow free access to the dredged pond while petitioners' agreement with their customers calls for an annual $72 regular fee.

444 U.S. at 180 (emphasis added).

Ruckelshaus v. Monsanto, supra, added another crucial dimension to the issue of reasonable investment-backed expectations. There, the Court held that where it is clear as a matter of law that the property owner could not have had any reasonable investment-backed expectations, there is no taking. The Court need not proceed to examine the other taking factors. 467 U.S. at 1005-06.

In *Ruckelshaus*, Monsanto claimed that certain provisions of the Federal Insecticide, Fungicide and Rodenticide Act effected a taking of property without just compensation. The challenged provisions, passed in 1978, governed use of data submitted to the Environmental Protection Agency ("EPA") by applicants for pesticide registration. They provided that data submitted by the applicant could be used or revealed by EPA at certain times and under certain circumstances, even if trade secrets were involved. 467 U.S. at 994-96, 1006.

The Court held that with respect to any data submitted by Monsanto after the effective date of the 1978 provisions,

> Monsanto could not have had a reasonable, investment-backed expectation that EPA would keep the data confidential beyond the limits prescribed in the amended statute itself. Monsanto was on notice of the manner in which EPA was authorized to use and disclose any data turned over to it by an applicant for registration. . . .
>
> * * *
>
> If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.
>
> * * *
>
> Thus, as long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

467 U.S. at 1006-07. The Court found "the force of this [reasonable investment-backed expectations] factor . . . so overwhelming . . . that it dispose[d] of the taking question. . . ." 467

U.S. at 1005. Thus, *Ruckelshaus* holds that where the owner makes his investment with full knowledge of a law which is rationally related to a legitimate purpose, the loss caused by the law is not an unconstitutional taking.

That is precisely what occurred in the case at hand. The Nollans did not actually purchase the property in question until sometime after February 15, 1984. Jurisdictional Statement at 5 n. 1. Public Resources Code section 30212, the basis for the Commission's imposition of the public access requirement, was enacted in 1976, eight years prior to their investment. Any expectation the Nollans might have had that they could build their new house without dedicating lateral public access along the beach clearly had no reasonable basis since the statutory provision had been in effect for nearly a decade.[3]

The Nollans had a full range of choices available to them before they made any investment at all. They could have decided not to purchase the property. They could have decided to purchase the property but to restrict their improvements so as not to increase the size of the dwelling more than 10 percent over that of the original house. Or they could have decided to purchase the property and construct a much larger new house, thereby subjecting themselves to the Commission's requirement that they dedicate lateral public access along their beach. They chose to reject their first two options and proceed with the third. They therefore voluntarily made their investment knowing that Public Resources Code section 30212 created the strong likelihood of a required public access dedication.

Like Monsanto, which chose to submit data to the government, knowing that the law in effect at that time permitted the government to use that data and reveal certain of it to the public, the Nollans chose to purchase the property and construct a large new dwelling knowing that the Coastal Commission would require

[3] The Nollans actually purchased the property after the Commission had imposed the permit condition at issue here. However, amici curiae are of the view that any expectations the Nollans might have formed are completely negated by the enactment of Public Resources Code Section 30212 before they purchased the property.

that they dedicate lateral beach access to the public. Under these circumstances, the Nollans had no reasonable investment-backed expectations and there can be no taking as a matter of law.[4]

C. There Was No Taking Because the Coastal Commission Permit Condition Had Little or No Economic Impact Upon the Nollans.

In the case of a governmental regulatory action, there can be no taking where the action has no economic impact on the property owner. *Agins v. City of Tiburon, supra*, 447 U.S. at 260. In the instant case, there is no taking, not only because there was no

[4] The United States attempts to distinguish this case from *Ruckelshaus* on the ground that "in *Monsanto* . . . the elements of voluntariness and reasonableness had been satisfied, while in this case these are precisely the elements at the core of the controversy." United States brief at 18-19 (footnote omitted). The distinction fails. Monsanto's action was, if anything, less "voluntary" than was the Nollans' decision to purchase the property and construct a large new house. Monsanto is engaged in the development and production of chemical products, including pesticides. 467 U.S. at 997. In order to sell a pesticide, it must register it with EPA. In order to register the pesticide, Monsanto must submit sufficient data to show that the pesticide will not have unreasonably adverse effects on the environment. 467 U.S. at 992. Thus, for Monsanto to continue its business, it had no choice: it had to submit its data to EPA.

The Nollans, in contrast, had far more options open to them, including not purchasing the property, or purchasing it but restricting their reconstruction activities. They had used the house in its previous state for forty years. (J.A. 309-310.) There is no reason that they could not have repaired and maintained or even reconstructed it to make it suitable for the next forty years. Nor is the reasonableness of the permit condition and its relation to governmental objectives any more in question in this case than it was in *Ruckelshaus*.

The United States also attempts to distinguish *Ruckelshaus* on the grounds that pesticide regulation uniquely implicates public health. United States brief at 19. In this case, however, the permit condition implements constitutional provisions establishing a public trust over tidelands and requiring adequate public access to those tidelands. The governmental interest at stake could hardly be more significant.

infringement of reasonable investment-backed expectations, but also because the economic impact on the Nollans of the Coastal Commission's action appears to be non-existent. Even though the record lacks specific information regarding the value of the property in question, the evidence does show that the Nollans suffered no economic harm from the Commission's action.

First, as explained above, the Nollans purchased the property long after the enactment of Public Resources Code section 30212. The existence of the statute was known and presumably taken into account by both the buyer (Nollans) and the seller and thus was reflected in the purchase price paid by the Nollans. It could not, therefore, have had an economic impact on the Nollans.

Second, the access condition merely formalized what had long been the practice of both the Nollans and their predecessors, the Faria family. (J.A. 48, 85-86, 303) The public had always been permitted access along the beach portion of the Nollans' lot and along the entire stretch of the Faria Beach. The permit condition merely ensured and formalized the continuation of the status quo.

Third, most of the Nollans' property was unaffected by the permit condition. The Nollans retained full and exclusive use of the house, garage, and all property inland of the seawall. The eight foot high seawall serves as a physical boundary separating the private living portion of the Nollans' property from the beach available to the public. At certain times of the year, when high tide reaches and even passes the seawall, the permit condition is in essence a nullity, since there is no land between the high tide line and the seawall. (J.A. 61)[5]

---

[5] Even during the remainder of the year, the amount of beach subject to the permit condition is small. The Nollans repeatedly claim that the Commission's public access condition affects one-third of their property. *See, e.g.*, Appellants' Brief at i, 5, 6, 18. The facts in the record indicate that this is a gross exaggeration. The permit condition requires a dedication of public access between the seawall and the mean high tide line. (J.A. 34) The record indicates that the seawall is, at most, ten feet from the mean high tide line. (J.A. 61) As the property is less than forty feet wide at that point, less than 400 square feet of the property is affected by the condition. (J.A. 26) Assuming that the Nollans are correct in asserting that their property consists of 3800 square feet, the access condition affects just over 10 percent of their property. If the Commission is correct that the property is only 2800 square feet, then the condition affects less than 15 percent of the property.

If the Court finds that there is insufficient evidence in the record to determine the precise economic impact of the Commission's action upon the Nollans, then the case should be remanded to the trial court to take evidence upon that point. In other words, based upon its review of the economic impact of the permit condition, the Court could find either that there is no economic impact and therefore no taking, or that there is insufficient evidence on the point so that remand is required. Under no circumstances is there sufficient evidence on this issue to support a holding that a taking has occurred.

II

THE COASTAL COMMISSION'S REQUIREMENT THAT THE NOLLANS ALLOW LATERAL PUBLIC ACCESS ACROSS THE BEACH AS A CONDITION TO THE PERMIT ALLOWING THE NOLLANS TO BUILD A NEW HOUSE IS NOT A PHYSICAL INVASION OF THE PROPERTY.

As discussed in section I above, the Court need not reach the third factor of the taking test—the character of the governmental action—because review of the first two factors establishes that no taking has occurred. In any event, analysis of the character of the governmental action demonstrates that the Commission's public access permit condition does not involve a physical invasion. Rather, it is indistinguishable, for the purposes of the takings analysis, from other governmental regulations, such as setback requirements, in-lieu fee requirements, and zoning requirements, in that it is a simple limitation upon the manner in which the Nollans may use their property.

A. Because the Nollans Were Free to Continue Using, Repairing, Maintaining, and Improving Their House Without Ever Being Subject to a Public Access Requirement, There Was No Physical Invasion.

The Nollans have, throughout this proceeding, emphasized that the original dwelling had "fallen into disrepair," that it had a "deteriorated condition" and a "shabby appearance," and that it was an "eyesore" and a "nuisance." Jurisdictional Statement at 5. They note that the building violated many building, health, and safety code standards and that they "were eventually forced to stop renting it" due to its poor condition. *Id.* The Nollans advised this Court that they could not remedy or repair the rundown condition of the house without being forced to dedicate access along the beach. Jurisdictional Statement at 4-5.

As Public Resources Code section 30212 itself makes clear, however, the Nollans' claim is erroneous. Section 30212 specifies a number of actions that property owners may take without subjecting themselves to a public access easement dedication. An owner may replace any structure destroyed by disaster; may demolish and reconstruct a residence provided that the size of the new residence does not exceed that of the old by more than 10 percent; may construct improvements to any structure which do not change the intensity of its use; and may repair or maintain structures and improvements as long as such actions do not have an adverse impact on lateral public access along the beach. The Nollans' assertion that section 30212 requires a dedication of access along the beach for any construction, repair or improvement activity is patently false. *See* Jurisdictional Statement at 4.

Despite the law's clear permission to do any of these things, the Nollans chose to do otherwise, constructing a new home more than three times the size of the old one, together with a garage that, by itself, is almost the size of the old house. (J.A. 56) By taking this action, the Nollans voluntarily subjected themselves to the public access requirement.

Further, the Commission simply placed a condition upon the Nollans' intensified use of the property. In other words, the Commission regulated the Nollans' use of their property. The

Nollans, when faced with the condition, remained free to reject the condition and reduce their renovation plans so as not to subject themselves to a public access requirement under Public Resources Code section 30212.

This situation contrasts sharply with circumstances in which the Court has found either a permanent physical occupation or a lesser physical invasion. In each such case, the action taken or authorized by the government has been unilateral and beyond any control of the property owner.

In *Loretto*, for example, the challenged law provided that the landlord could not interfere with the installation of cable television facilities. As the Court stated in that case, a permanent physical occupation such as that effected by the New York law

> is qualitatively more severe than a regulation of the *use* of property, even a regulation that imposes affirmative duties on the owner, since the owner may have no control over the timing, extent, or nature of the invasion.

Loretto, supra, 458 U.S. at 436 (emphasis in original). The Court went on to point out that its holding was "very narrow":

> We affirm the traditional rule that a permanent physical occupation of property is a taking . . . .We do not, however, question the equally substantial authority upholding a State's broad power to impose appropriate restrictions upon an owner's *use* of his property.

458 U.S. at 441 (emphasis in original). Whereas in *Loretto*, the owner was denied the right to occupy the space himself, was denied all control over the use of the property taken, and was deprived of all value of that property, the Nollans retained each of these things. *See also United States v. Pewee Coal Co.*, 341 U.S. 114 (1951) (government takeover of company during war); *United States v. Causby*, 328 U.S. 256 (1946) (government regularly conducted flights over plaintiff's land); *Pumpelly v. Green Bay Co.*, 13 Wall. 166 (1872) (dam permanently floods plaintiff's property).

Even government actions found to be lesser physical invasions—and thus not per se takings—have been unilateral imposi-

tions upon property owners. In *Kaiser Aetna v. United States, supra*, the Court emphasized that a key to its holding was that the Government had given its unconditional consent to the dredging and then, after it was complete, simply asserted that the public had access. The Court noted:

> We have not the slightest doubt that the Government could have . . . conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation.

Kaiser Aetna, supra, 444 U.S. at 179.

The instant case differs significantly from all of the cases discussed above. The Coastal Commission did not initiate this action; the Nollans did. Had the Nollans not sought to replace their home with a new home triple the size, the public access requirement would not have been imposed. The Commission was simply regulating the Nollans' use of the property by imposing a permit condition which the Commission found rationally related to the change in intensity of use of the property proposed by the Nollans.

Therefore, the factors relevant to a determination whether a taking occurred are the extent of any infringement of the Nollans' reasonable investment-backed expectations and the nature of the economic impact of the requirement. (*See* § I, *supra*.) Because no physical invasion was unilaterally imposed, the third factor, character of the government action, weighs against finding a taking in this case.

B. Exactions Required as a Condition to Subdivision or Development Permits Are Like Other Zoning Regulations and Should Be Subject to the Same Taking Test.

The United States argues that even if the Court does not view the public access condition as a permanent physical occupation and thus a per se taking, still it should consider the "physical invasion" resulting from the access condition to be a factor weighing in favor of finding a taking. United States brief at 15-16 ("[t]he physically invasive character of the condition in this case renders substantially more burdensome the government's task of

justification."). As a matter of constitutional theory, this makes no sense.[6]

First, such a theory would make a major constitutional distinction between land dedications and equivalent in-lieu fees.[7] A developer that dedicated land for a park could be lucky enough to obtain compensation, while another developer who paid in-lieu fees in an amount equal to the value of a land dedication would not be compensated. This would result because the dedication was considered a "physical invasion" whereas the fee payment was not. There is no constitutional ground for making such a distinction. A ruling that a dedication is more likely to be a taking than an in-lieu fee will mean simply that governments will always require in-lieu fees, which will in turn be used to purchase the land necessary for the required facilities. Just as an in-lieu fee requirement is simply a permit condition regulating property use, so is a dedication requirement.

Other examples highlight the meaninglessness of the proposed constitutional distinction. Under the United States' theory, a public access dedication requirement such as the one at issue in this case, that did not limit or affect in any way the historical use of the property, would automatically be far more likely to be a taking than even the most severe zoning or setback requirement which prohibited the existing use of the property or which caused

---

[6] As commentators Heyman and Gilhool state,

> There seems no ground for distinguishing constitutionally a 'positive exaction' and negative regulation of use. Either, neither, or both can be discriminatory or a taking in any specific case.

Heyman and Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L. J. 1119, 1137 (1964).

[7] "Dedications" are transfers of land from a property owner or subdivider to the government. The term "exactions" is broader, including both land dedications as well as "in-lieu fees" or "impact fees". "In-lieu fees" are charges equal to the value of land that would otherwise be dedicated. "Impact fees" are charges levied on new developments to help finance capital improvements made necessary by the new development.

a dramatic diminution in the property's value. See, e.g., *Hadacheck v. Sebastian*, supra; *Gorieb v. Fox*, supra, 274 U.S. 603; *William C. Haas Co. v. City of San Francisco*, supra. This is because any dedication requirement would be considered a physical invasion whereas any zoning or setback requirement, no matter how severely it limited use of the property, would not.

Second, the theory advanced by the United States would create a meaningless distinction based on the precise public use made of the dedicated property. Land dedicated for use as a street would presumably qualify as "physically invaded" since members of the public would regularly use the land. But what about, for example, solar access easements? See Cal. Gov. Code § 66475.3. An owner would be deprived of use of airspace just as one is deprived of the use of property when dedicating other fees or easements. Is a solar access easement a physical invasion? Or is it more analogous to a setback requirement, which is not considered a physical invasion? See *Gorieb v. Fox*, supra, 274 U.S. 603 (setback regulation prohibiting all use of a portion of a parcel of land valid because the property as a whole could be beneficially used). Would it mean that a land dedication used for a street is more likely to be a taking than a dedication for a wildlife refuge or a habitat protection area? A street, used constantly by members of the public and physically transformed with pavement, sidewalks, etc., is certainly more physically invasive than a wildlife refuge or habitat protection area, where the land is left in its natural state and the public is not permitted entry.

The constitutionality of a dedication requirement should not depend upon the distinction between dedications and in-lieu fees or between streets, solar access easements, and preservation areas. Rather, dedication and exaction requirements should be considered in just the same manner as setbacks and other zoning regulations. All are regulations of land use or limitations placed by the government on the ways in which private property can be used.

III

EVEN IF THE COURT FINDS THAT THIS CASE INVOLVES A PHYSICAL INVASION, SINCE IT IS NOT A PERMANENT PHYSICAL OCCUPATION, THE TRADITIONAL TAKING ANALYSIS, RATHER THAN A PER SE RULE, APPLIES.

A. Since the Invasion Resulting from the Required Public Access Dedication Is Occasional and Sporadic, the Traditional Taking Analysis Applies.

As discussed in section II above, this case involves a regulatory action, not a physical invasion. Even if the Court were to find that the Coastal Commission's imposition of a public access requirement did constitute a physical invasion of the Nollans' property, still there would be no taking per se.

The only circumstance in which the Court will find a taking without invoking the usual balancing test is where the government has authorized or carried out a permanent physical occupation of private property. *Loretto, supra*, 458 U.S. at 432-34, 441. The Court has found such a permanent physical occupation of property in only a small handful of cases. See *Loretto, supra; Pumpelly v. Green Bay Co., supra; United States v. Pewee Coal Co., supra; United States v. Causby, supra.*

In *Loretto*, the Court went to great lengths to underscore the limited circumstances under which a physical invasion is grounds for finding a taking per se. The Court noted that the public access easement at issue in *Kaiser Aetna* was not a permanent occupation of land and therefore not a taking per se. 458 U.S. at 433. Similarly, the *Loretto* Court held that in *PruneYard* the invasion was "temporary" and "limited in nature" so a per se rule did not apply. 458 U.S. at 434.

Like the public access easement in *Kaiser Aetna* and the similar public intrusion in *PruneYard*, the public access dedication required by the Coastal Commission, if considered a physical invasion at all, is temporary, sporadic, and limited in nature. Under no circumstances could it qualify as a "permanent physical occupation" under the terms of *Loretto*. The Nollans can still use

the portion of the property subject to the easement to the same extent that they always have. And that portion of the property still confers additional value upon the property as a whole because it is adjacent to the ocean. Thus, the Commission's condition takes but one small strand—the right to exclude the public from a small portion of the property—from the Nollans' bundle of property rights rather than "chopping through the bundle." 458 U.S. at 435-36.

For these reasons, even if the Court were to consider this case to involve a physical invasion, nevertheless it would have to analyze the other two factors: reasonable investment-backed expectations and economic impact of the regulation. *PruneYard, supra*, 447 U.S. at 83; *Kaiser Aetna, supra*, 444 U.S. at 175. As explained above, application of these factors to the facts of this case leads to the conclusion that no taking occurred.

B. If a Per Se Taking Rule Were Applied in This Case, It Would Have to Be Applied to Virtually Any Dedication Requirement; Such a Holding Would Drastically Curtail the Ability of Governments to Regulate Land Use For the Public Benefit.

1. How Dedications and Exactions Are Used in California.

In California, as in other states, local governments rely extensively upon dedications as a means of placing some of the costs of new or intensified development upon the newcomers rather than upon the public at large.[8] For more than forty years, California

[8] Other purposes served by these required dedications are deterrence of premature and excessive subdivision and protection of ratepayers from the costs of municipally installed improvements which remain unused when lots are not sold. Heyman and Gilhool, *supra*, 73 Yale L. J. at 1121.

According to other commentators, subdivision exaction requirements were adopted "to eliminate the jumble of disconnected street systems resulting from earlier voluntary dedications and to avoid a future public debt like that experienced by subdivisions made defunct by the real estate crash of the 1920s." Bosselman and Stroud, Pariah to Paragon:

law has vested local governments with authority to require the dedication of real property as a precondition to subdivision approval, to facilitate the provision of streets and infrastructure.

At first, state law permitted mandatory dedications only for streets, alleys, drainage and public utility easements necessitated by the new subdivision.[9] *See* Cal.Gov. Code § 66475, first enacted in 1943 as Cal. Bus. & Prof. Code § 11535. In later years, state laws were enacted granting local governments in California the authority to condition subdivision approval upon either dedication of land or provision of in-lieu fees for other infrastructure elements required for new subdivisions. Local governments were given authority to require payment of fees to defray the cost of drainage and sanitary sewer facilities (Cal. Gov. Code § 66483) and to defray the cost of constructing bridges and "major thoroughfares" which benefit the subdivision. Cal. Gov. Code § 66484.

California law permits mandatory dedications or in-lieu fees for park or recreational purposes, and for public facilities, including fire stations, libraries, schools, and recreational facilities. Cal. Gov. Code §§ 66477, 66478, and 66479. Other mandatory dedications authorized under certain circumstances are dedication of public transit facilities (such as bus turnouts, benches, shelters and similar items) which directly benefit the residents of a subdivision (Cal. Gov. Code § 66475.2), land for bicycle paths for the use and safety of the subdivision residents (Cal. Gov. Code § 66475.1), easements for the receipt of sunlight for solar energy systems within the subdivision (Cal. Gov. Code § 66475.3), and fees for the construction of recharge facilities for groundwater aquifers (Cal. Gov. Code § 66484.5).

Developer Exactions in Florida, 1975-85, 14 Stetson L. R. 527, 528 (1985).

[9] The "requirement" that a developer dedicate streets within the subdivision to the local government is typically favored by the developer as it shifts the costs of street maintenance and repair from the developer to the community tax base. *See* Heyman and Gilhool, *supra*, 73 Yale L. J. 1131.

In addition to Public Resources Code section 30212, which authorizes the Coastal Commission to exact public access dedications and which is at issue in this case, a number of other code sections permit mandatory dedications to help ensure public access to public waters. Local governments may mandate dedications in order to ensure the public's access to public waterways (Cal. Gov. Code § 66478.4), stream and river banks (Cal. Gov. Code § 66478.5), publicly-owned lakes and reservoirs (Cal. Gov. Code § 66478.12), and the ocean coastline and bay shoreline below the ordinary high water mark (Cal. Gov. Code § 66478.11). These code sections are a critical component of state and local governments' ability to implement article X, section 4 of the California Constitution guaranteeing public access to the tidelands, as well as the public trust doctrine, also grounded in the California Constitution.

2. The Effect of Finding the Nollans' Permit Condition a Per Se Taking.

The Nollans argue that their permit condition, and consequently any dedication requirement, is a physical invasion and thus per se a compensable taking. Appellants' brief at 20. Elsewhere in this brief amici explain the legal fallacies in this argument. *See* §§ II, IIIA, *supra*. In addition, the practical implications are staggering.

A finding that the Coastal Commission's public access permit condition is a per se taking would deprive state and local governments of one of their most essential planning tools. If this permit condition is considered a permanent physical occupation and therefore a taking, then virtually every dedication requirement must suffer the same fate. Governments would be prevented from requiring even the most basic and long upheld dedications of streets and utility easements within the subdivision because such dedications would be per se takings. Fifty years of planning doctrine would be thrown out. A new, much narrower, definition of the scope of the police power would govern, allowing governments far less freedom in their efforts to protect and promote the public health, safety and welfare, than they have enjoyed to date. Under this new narrowed formulation of the police power, a government could not require dedications even when the developer obviously created the need (*e.g.*, streets within a subdivision).

IV

IMPOSITION OF THE PERMIT CONDITION WAS A REASONABLE EXERCISE OF THE POLICE POWER SINCE THERE WAS A RATIONAL RELATIONSHIP BETWEEN THE PERMIT CONDITION AND A LEGITIMATE GOVERNMENTAL OBJECTIVE.

A. The Constitution Requires a Rational Relationship Between the Permit Condition and Legitimate Governmental Interests.

Another constitutional issue raised in this case which is closely intertwined with the taking issue is whether the Coastal Commission's permit condition was a reasonable exercise of the police power. In order for the permit condition to be a reasonable exercise of the police power, there must be a rational relationship between the permit condition and a legitimate governmental interest. As this Court has stated,

> the law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.

Williamson v. Lee Optical Co., 348 U.S. 483, 487-488 (1955). Some courts address this issue as a question of substantive due process; others use a takings rubric. *See, e.g., Ruckelshaus v. Monsanto, supra*, at 998-9; *Rogin v. Bensalem Township*, 616 F.2d 680, 689-690 (3d Cir. 1980), *cert. denied, Mark-Garner Associates, Inc. v. Bensalem Township*, 450 U.S. 1029 (1981). *See also Goldblatt v. Hempstead*, 369 U.S. at 594-5. A rational relationship exists if there is any state of facts either known or which could reasonably be assumed which affords support for the law. *See Williamson v. Lee Optical, supra; United States v. Carolene Products*, 304 U.S. 144, 154 (1938); *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981).

In reviewing zoning and other land use laws, the courts give great deference to the legislative judgment:

> State Legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing [urban] conditions require; and their conclusions should not be disturbed by the courts, unless clearly arbitrary and unreasonable.

Gorieb v. Fox, supra, 274 U.S. at 608. *See also Euclid v. Ambler Realty Co.,* 272 U.S. 365, 388 (1926); *Construction Industry Association, Sonoma County v. City of Petaluma,* 522 F.2d 897 (9th Cir. 1975), *cert. denied* 424 U.S. 934 (1976) ("[b]eing neither a super legislature nor a zoning board of appeal, a federal court is without authority to weigh and reappraise the factors considered or ignored by the legislative body in passing the challenged zoning regulation. The reasonableness, not the wisdom, of the [zoning] is at issue . . . .") Thus it has long been clear that courts will not second-guess governmental zoning and land use determinations, for to do so would tie the hands of state and local governments and insert the courts into an inappropriate arena of decision-making.

Even regulations which place severe burdens on isolated property owners and which benefit those owners only in the same abstract sense that the whole community benefits will not be found an unreasonable exercise of the police power. *See, e.g., Hadacheck v. Sebastian, supra,* (law prohibiting brickyards caused one owner's property to devalue from about $800,000 to a maximum of $60,000 with no specific benefits to him); *Goldblatt v. Hempstead, supra; Miller v. Schoene, supra.*

B. There Is No Constitutional Basis For Requiring More Than A Rational Relationship Between the Permit Condition and Legitimate Governmental Objectives.

The Nollans, the United States and supporting amici all argue that a specific relationship between the required public access dedication and the needs created by the Nollans' new development is required above and beyond a rational relationship between the dedication and the governmental objective of ensuring public access to the state's shoreline. In essence, they argue that the Coastal Commission, in imposing a public access permit condition upon the Nollans, is subject to a higher constitutional standard than other governmental entities imposing other sorts of land use regulations. Appellants' arguments have no basis in the United States constitution.

The constitution requires two things. *See Agins v. City of Tiburon, supra,* 447 U.S. at 260. First, the regulation must not effect a taking. As discussed above in sections I, II, and III, the Court has set forth several factors to be analyzed in making this determination. None of these factors requires the kind of relationship advocated by appellants. Second, the regulation must not violate due process by exceeding the limits of the police power. A regulation satisfies this requirement if there is a rational relationship between it and legitimate governmental interests. *See, e.g., Williamson v. Lee Optical, supra,* 348 U.S. at 487-8.

The Commission's permit condition easily meets the requirements of substantive due process. The permit condition was enacted pursuant to Public Resources Code sections 30210-30212. Those code sections require that maximum public access be provided to carry out the requirement of article X, section 4 of the California Constitution. To that end, they also require that public access be provided in new development projects except where adequate access already exists or where agriculture would be adversely affected, or where public access is inconsistent with public safety, military needs or the protection of fragile coastal resources.

These provisions clearly advance legitimate governmental goals. *See Agins v. City of Tiburon, supra,* 447 U.S. at 261 (city zoning ordinance enacted in furtherance of California statutory open space protection scheme substantially advances legitimate governmental purpose of preserving open space). The goals of the Coastal Act and sections 30210, 30211, and 30212 in particular, to maximize public access to and along the coast, are legitimate, as they parallel provisions of the state's own constitution. *See* Cal. Pub. Res. Code § 30001.5. And the State has determined that these provisions of the Coastal Act are necessary to carry out its

constitution. Cal. Pub. Res. Code § 30210. The Coastal Commission, by imposing the permit condition, was merely enforcing these legitimate and lawful provisions of state law. Clearly, therefore, there is a rational relationship between the permit condition and *legitimate governmental interests.*[10]

The only federal cases cited by the Nollans and amici in support of their claim that the permit condition is subject to a higher constitutional standard than usual are the so-called "unconstitutional condition" and related cases. *See* Appellants' brief at 22-27; HomeBuilders brief at 6-9. These cases do not support their arguments. For the most part, they concern unilateral assessments by the government upon unwitting property owners. *See, e.g., Norwood v. Baker*, 172 U.S. 269 (1898); *Nashville, Chattanooga, & St. Louis Railway v. Walters*, 294 U.S. 405, 412 (1935); *Atchison, Topeka & Santa Fe Railway Co. v. Public Utilities Commission of California*, 346 U.S. 346, 349 (1953). As explained *supra* at section II, this case does not involve a unilateral imposition by the government upon a property owner. Rather, the permit condition gave the Nollans the choice whether to limit their construction work in specified respects or to agree to dedicate public access along their beach. The Nollans chose not to maintain or repair or reconstruct their house, but to build a much larger new house, thereby foregoing their option of avoiding the permit condition. The facts of this case bear no resemblance to the unconstitutional condition cases.[11]

---

[10] The Nollans do not claim that the permit condition is not rationally related to the legitimate purpose of the Coastal Act to provide "[m]aximum public access to and along the coast." Cal. Pub. Res. Code § 30001.5.

Moreover, there is abundant evidence in the record supporting the Coastal Commission's determination that construction of the Nollans' new house would, both by itself and cumulatively in connection with numerous other such new coastline developments, interfere with the public's access to the shoreline. *See, e.g.*, J.A. 41-261.

[11] *Parks v. Watson*, 716 F.2d 646 (9th Cir. 1983), does not, as appellants claim, support their argument. In *Parks*, the court discussed the requirement of many state courts that a dedication must have some reasonable relationship to the needs created by the subdivision. 716 F.2d at 653. The court invalidated the condition imposed in that case, however, not because it did not relate to the needs created by the permit but because it "was totally unrelated to [the city's] . . . legitimate interest in receiving compensation for vacation [of street plats]." 716 F.2d at 652. Thus, the Ninth Circuit was merely applying the usual rational standard to determine whether the city's action was a reasonable exercise of its police power.

Furthermore, these cases merely stand for the proposition that the government may not impose a choice between a valuable governmental benefit and the exercise of a constitutionally guaranteed right. *See Perry v. Sindermann*, 408 U.S. 593, 597 (1972). These cases do not expand the reach of those constitutional rights. The rights at issue in this case are two: the right to just compensation if one's property is taken for public use, and the right to not be deprived of one's property without due process of law. With respect to the just compensation (or taking) issue, a review of all the factors which this Court has found relevant reveals that no taking has occurred. *See* §§ I-IV, supra. And with respect to the issue of substantive due process (or reasonable exercise of police power) the record is clear that the required rational relationship between governmental objectives and the permit condition is present. The constitution requires nothing more.

CONCLUSION

For all the reasons stated herein, amici respectfully request that this Court affirm the decision of the California Court of Appeal.

DATED: February 5, 1987

Respectfully submitted,

E. CLEMENT SHUTE, JR.
(Counsel of Record)
ALLETTA D'A. BELIN
FRAN M. LAYTON
SHUTE, MIHALY & WEINBERGER
Attorneys for Amici Curiae

AMICUS CURIAE

BRIEF

No. 86-133

Supreme Court, U.S.
FILED
FEB 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JAMES PATRICK NOLLAN and MARILYN HARVEY NOLLAN,
Appellants,

v.

CALIFORNIA COASTAL COMMISSION,
Appellee.

On Appeal from the Court of Appeal of the State of California, Second Appellate District

---

BRIEF FOR THE COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF ALABAMA, ARKANSAS, CONNECTICUT, DELAWARE, FLORIDA, HAWAII, ILLINOIS, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MINNESOTA, MISSOURI, NEBRASKA, NEW HAMPSHIRE, NEW JERSEY, NEW YORK, NORTH CAROLINA, NORTH DAKOTA, OREGON, RHODE ISLAND, TENNESSEE, TEXAS, VERMONT, WASHINGTON, WEST VIRGINIA, AND WISCONSIN AS AMICI CURIAE URGING AFFIRMANCE

JAMES M. SHANNON
Attorney General

LEE P. BRECKENRIDGE*
NATHANIEL S. W. LAWRENCE
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place
Boston, MA 02108
(617) 727-2265

Attorneys for Amicus Curiae Commonwealth of Massachusetts

**Counsel of Record*

[Other Counsel Listed on Inside of Front Cover]

PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

OTHER COUNSEL FOR 28 AMICI STATES

DON SIEGELMAN
Attorney General of Alabama

JOHN STEVEN CLARK
Attorney General of Arkansas

JOSEPH LIEBERMAN
Attorney General of Connecticut

CHARLES M. OBERLY
Attorney General of Delaware

ROBERT BUTTERWORTH
Attorney General of Florida

WARREN PRICE, III
Attorney General of Hawaii

NEIL F. HARTIGAN
Attorney General of Illinois

THOMAS J. MILLER
Attorney General of Iowa

ROBERT T. STEPHAN
Attorney General of Kansas

WILLIAM J. GUSTE, JR.
Attorney General of Louisiana

JAMES E. TIERNEY
Attorney General of Maine

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

HUBERT H. HUMPHREY, III
Attorney General of Minnesota

WILLIAM L. WEBSTER
Attorney General of Missouri

ROBERT M. SPIRE
Attorney General of Nebraska

STEPHEN E. MERRILL
Attorney General of New Hampshire

W. CARY EDWARDS
Attorney General of New Jersey

ROBERT ABRAMS
Attorney General of New York

LACY H. THORNBURG
Attorney General of North Carolina

NICHOLAS SPAETH
Attorney General of North Dakota

DAVE FROHNMAYER
Attorney General of Oregon

JAMES E. O'NEIL
Attorney General of Rhode Island

W.J. MICHAEL CODY
Attorney General of Tennessee

JIM MATTOX
Attorney General of Texas

JEFFREY AMESTOY
Attorney General of Vermont

KENNETH O. EIKENBERRY
Attorney General of Washington

CHARLES G. BROWN
Attorney General of West Virginia

DONALD J. HANAWAY
Attorney General of Wisconsin

QUESTION PRESENTED

Does a State unconstitutionally take property by applying a statutory restriction on intensified development fronting on a public resource area to a parcel which already enjoys a reasonable beneficial use and which the owners knowingly purchased subject to that restriction?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF AMICI	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	2
ARGUMENT	3
I. PERMIT CONDITIONS LIKE THOSE APPLIED TO THE NOLLANS' TRACT DO NOT ORDINARILY RAISE TAKINGS CONCERNS.	3
II. BECAUSE OF ITS MINIMAL INTERFERENCE WITH APPELLANTS' REASONABLE EXPECTATIONS AND BENEFICIAL USE OF THEIR PROPERTY, THE PERMIT CONDITION WHICH CALIFORNIA APPLIED TO THEIR DEVELOPMENT AND TO THOSE OF ALL SIMILARLY SITUATED LOT OWNERS COULD NOT WORK A TAKING.	8
A. Regulatory Takings Occur Only When The Governmentally Imposed Burden Is Both Unusually Substantial And Violative Of The Owner's Reasonable Expectations.	8
B. Appellants' Takings Claim Fails Because The Application Of California's Coastal Act To Their Property Did Not Interfere With Their Reasonable Expectations.	14
C. Transient Public Passage Across The Strip Of Beach The Appellants Claim To Own Is Not A Substantial Burden On Their Property Rights.	17
1. *No "Permanent Physical Occupation"*	17

2. *Insubstantial "Physical Invasion"*	18
3. *No "Diminution of Value"*	20
III. THE PERMIT CONDITION APPELLANTS CHALLENGE MEETS THE ONLY FEDERAL CONSTITUTIONAL STANDARDS GOVERNING THE RELATIONSHIP OR NEXUS BETWEEN SUCH CONDITIONS AND THE PROBLEMS CREATED BY THE PROPOSED ACTIVITY.	21
A. Permit Conditions Which Do Raise Takings Questions Are Subject To The Same Analysis As Other Restrictions, Not To A Specially Heightened Takings Scrutiny.	21
B. The Relevant Constitutional Inquiry Specific To Ordinary Permit Condition Requirements Is Whether As A Matter Of Federal Due Process, The Condition Is So Unrelated To The Legislative Goal As To Be Arbitrary And Irrational.	26
CONCLUSION	30

TABLE OF AUTHORITIES

CASES: Page

Agins v. Tiburon, 447 U.S. 255 (1980) ..... *passim*

Andrus v. Allard, 444 U.S. 51 (1979) 9,10,11,13

Berman v. Parker, 348 U.S. 26 (1954) 25,29

Bibb v. Navajo Freight Lines, 359 U.S. 520 (1959) 26

Connolly v. Pension Benefit Guaranty Corp., 106 S. Ct. 1018 (1986) 13,15

Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) 28

Erie R. R. Co. v. Public Utilities Comm'rs, 254 U.S. 394 (1921) 12

Euclid v. Ambler Realty Company, 272 U.S. 365 (1926) ..... *passim*

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 28

Ferguson v. Skrupa, 372 U.S. 726 (1963) 27

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, No. 85-1199 ... 9

Fox River Co. v. Railroad Comm'n, 274 U.S. 651 (1927) 5

Frost & Frost Trucking Co. v. Railroad Comm'n, 271 U.S. 583 (1926) 7,24

Georgia Railway & Electric Co. v. Decatur, 295 U.S. 165 (1935) 23

HFH Ltd. v. Superior Court of Los Angeles County, 15 Cal. 3d 508 (1975), *cert. denied*, 425 U.S. 904 (1976) 11

Hadacheck v. Sebastian, 239 U.S. 394 (1915) ..... *passim*

Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) 27

Hudgens v. NLRB, 424 U.S. 507 (1976) 13

Jacob Ruppert v. Caffey, 251 U.S. 264 (1920) 11

Table of Authorities Continued

Page

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 4,10,17,18

Kirby Forest Industries v. United States, 467 U.S. 1 (1984) 9,10

Lloyd Corp. v. Tanner, 407 U.S. 551 (1972) 13

Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) 10,17,18

Martinez v. California, 444 U.S. 277 (1980) 26

Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456 (1981) 28

Monongahela Navigation Co. v. United States, 148 U.S. 312 (1893) 24

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 28

Mugler v. Kansas, 123 U.S. 623 (1887) 11

Myles Salt Co. v. Board of Commissioners, 239 U.S. 478 (1916) 23

Nashville, C. & St. L. Ry v. Walters, 294 U.S. 405 (1935) 24,29

Nectow v. Cambridge, 277 U.S. 183 (1928) 24

Norwood v. Baker, 172 U.S. 269 (1898) 23

Parks v. Watson, 716 F.2d 646 (1983) 7

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978) ..... *passim*

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 9,11

Perry v. Sinderman, 408 U.S. 593 (1972) 7

Portland General Electric Co. v. Federal Power Comm'n, 328 F.2d 165, 173 (9th Cir. 1964) .. 6

PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980) ..... *passim*

Table of Authorities Continued

	Page
Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984)	*passim*
Sherbert v. Verner, 379 U.S. 398 (1963)	7
Speiser v. Randall, 357 U.S. 513 (1958)	7
Sproles v. Binford, 286 U.S. 374 (1932)	30
Stephenson v. Binford, 287 U.S. 251 (1932)	24,29
United States v. Riverside Bayview Homes, Inc., 106 S. Ct. 455 (1986)	9
United States v. 5.96 Acres of Land, 593 F.2d 884 (9th Cir. 1979)	6
United States v. Appalachian Power Co., 311 U.S. 377 (1940)	5,6,7
United States v. Twin City Power Co., 350 U.S. 222 (1956)	29
Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976)	13
Village of Belle Terre v. Boraas, 416 U.S. 1 (1974)	26
Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155 (1980)	13
Western & Southern Life Ins. Co. v. State Bd. of Equalization, 451 U.S. 648 (1981)	27
Wickard v. Filburn, 317 U.S. 133 (1942)	23,29
Williamson County Regional Planning Comm'n v. Hamilton Bank, 473 U.S. 172 (1985)	4,9,20
Williamson v. Lee Optical Co., 348 U.S. 483 (1955)	26
Zahn v. Board of Public Works, 274 U.S. 325 (1927)	26

CONSTITUTIONS AND STATUTES:

U. S. Constitution:	
Amend. V	*passim*

Table of Authorities Continued

	Page
Amend. XIV	26
California Const. Article X, Section 4	15
Cal. Government Code §66475.4 (West 1987)	28
Cal. Public Resources Code §30000 *et. seq.* (West 1987)	4
§30212	27
§30212(a)	21
§30214(a)(3)	19
Federal Power Act, 16 U.S.C. §804	6
Massachusetts General Laws:	
ch. 91	1
ch. 130 §105	2
ch. 131 §40A	2
Iowa Code §455B.375(3)	1
Wisconsin Statutes:	
§236.13	1
§236.45	1

TREATISES AND PERIODICALS:

Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. L. 447 (1983)	13
Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119 (1964)	28
Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L.Rev. 1165 (1967)	11,17,19
Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 J. Urb. Contemp. L. 269 (1983)	28
Tribe, *American Constitutional Law* (1978)	26

STATEMENT OF INTEREST OF AMICI

Amici are responsible for ensuring that the natural resources within their borders are not over-used and over-developed to the detriment of the health, safety, and welfare of their residents and future generations. As the nation's economy and population continue to expand, increasing pressure is brought to bear on important diminishing resources. *Amici* are charged with decisions about how, and how much, to restrict or mitigate the impacts of this intensified development. At issue are resources both publicly and privately controlled. Among the significant resources affected are public trust lands, floodplains, air quality, wetlands, and urban infrastructures. In attempting to reconcile public and private interests in these and other resources *amici* face more and more difficult choices.

In reaching an accommodation of divergent land use interests, governments need flexibility to adjust for regional problems, practices, and expectations. Permit conditions make a widely used contribution to this process. In particular, access conditions have historically been an important land use planning tool for both states and municipalities. *See, e.g.*, Wisconsin Statutes §§236.13 and 236.45 (authority for local governments to require subdivision easements and dedications); proposed regulations implementing Massachusetts General Laws, chapter 91 (formalizing public access as part of waterfront development). More broadly a variety of non-access condition requirements, like Iowa's floodplains law, Iowa Code §455B.375(3), ensure consideration of more than a developer's own private interests in the land use planning process.

Inevitably, *amici* face a growing number of challenges to the planning choices they make, claims that assert both under- and over-regulation. The Court's review of the takings claim presented in this case is of particular concern

for *amici* in their efforts to bring both fairness and predictability to the balancing of the varied interests involved.

Takings challenges pose special problems for governmental planners because of their unpredictable outcomes. Even when statutes incorporate articulated constitutional standards, as do Massachusetts' Wetlands Restrictions Acts, M.G.L. c. 130 §105 and c. 131 §40A, virtually any land use regulation can now engender numerous lengthy "ad hoc, factual" inquiries. *Amici* believe, however, that this case, considered in light of the Court's takings jurisprudence, demonstrates that a structured threshold inquiry can differentiate between meritorious and spurious takings claims. They submit this brief because of their long-standing primary responsibility for land use planning, and their deep interest in the outcome of this case. They urge the Court to uphold the legislative judgment embodied in the permit condition at issue.

STATEMENT OF THE CASE

The *amici* States adopt appellee's statement.

SUMMARY OF ARGUMENT

Because the Nollans had no vested property interest in a new development permit and already had reasonable beneficial use of their land, and because the aggregate impact of the permit and condition on that use was to improve it, no question of a taking arises.

Even were this not the case, to raise a genuine concern about unconstitutional takings a governmental restriction, including one that imposes a permit condition on land use, must be both an unforeseeable and a substantial burden. These two elements underlie this Court's review of the "fairness and justice" of such restrictions. The absence of either vitiates a regulatory takings claim. The Nollans' takings claim founders on their lack of any reasonable expectation, at the time they purchased their beachfront

property, that it would be exempted from the Coastal Act's requirements. This lack is by itself dispositive of the case. Additionally, the Nollans demonstrated no loss of value, or of the reasonable beneficial use, of the stretch of beach they claim to own. Since the passage and repassage of the public is not a "permanent physical occupation," is in keeping with the character and historic use of the beach, and does not significantly disrupt the Nollans' privacy, the burden on them is also not sufficiently substantial to suggest a taking.

No specially heightened takings scrutiny is called for, simply because a permit condition is involved. The analysis of whether this condition rationally and effectively remedies problems created by the Nollans' project is a matter of due process, not of takings law. It is an investigation into the choice of means to an end. Scrutiny under federal due process law is deferential to the legislative determination that the Coastal Act's restrictions on new development effectively address the public access impact of intensified beachfront construction.

ARGUMENT

I. PERMIT CONDITIONS LIKE THOSE APPLIED TO THE NOLLANS' TRACT DO NOT ORDINARILY RAISE TAKINGS CONCERNS.

The deed restriction condition attached to the Nollans' new development project should not be analyzed as a takings problem. The Nollans had no vested property interest in the construction permit that would support a claim for compensation or invalidation. Under these circumstances, the Takings Clause of the United States Constitution is not normally implicated by the conditional grant of a permit.

The Takings Clause is not offended provided that, even without the permitted project, the owners had "reasonable beneficial use," *Williamson County Regional Planning*

Comm'n v. Hamilton Bank, 473 U.S. 172, 194 (1985), of their property, and had no government-created reasonable expectation that they were exempt from such conditions. *Cf. Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979)("the government could have refused to allow such dredging . . . or could have conditioned its approval of the dredging on petitioner's agreement to comply with various measures that it deemed appropriate for the promotion of navigation."). This is because the Takings Clause serves to protect people whose property otherwise is left substantially and unforeseeably worse off by governmental action.[1] The aggregate impact on landowners of granting conditional permission to intensify their use of property is to provide them with more beneficial use of that property.

Because the prior existing use of the Nollans' property was reasonably beneficial, and the Nollans had no property-like expectancy in an unconditioned permit, the imposition of the condition does not pose a takings problem. One vacation cottage on a lot no larger than 3800 square feet was already a reasonable beneficial use. *See Agins v. Tiburon*, 447 U.S. 255, 262 (1980)(permission to build at most five houses on five acres satisfies Takings Clause). Given the application of the permit condition to all surrounding parcels, Joint Appendix ("J.A.") 48, and the 40 years the Nollan family had enjoyed the pre-existing use of the property, *id.* at 59, the California Coastal Act[2] also did not "interfere with what must be regarded as [appellants'] primary expectation concerning the use of the parcel." *Penn Central Transportation Co. v. New York City*, 438 U.S. 104, 136 (1978).

Although both the Nollans and the Solicitor General argue in effect for a novel takings analysis in this case as though existing Supreme Court jurisprudence had never

[1] This point is discussed at length in Part II.A., *infra*.

[2] Cal. Public Resources Code §30000 *et. seq.* (West 1987)("the Coastal Act").

dealt with permit conditions,[3] the Court has recognized the inapplicability of the Takings Clause to similar circumstances. In *United States v. Appalachian Power Co.*, 311 U.S. 377, 420 (1940), the applicant objected to conditions attached to the permit which were unrelated to any problems posed by its project. The applicant specifically objected that the unrelated provisions, including one allowing the government eventually to acquire the project (a dam) and associated lands, worked a taking without just compensation. *Id.* at 392, 421. The Court recognized the potential for "coercive" use of the licensing power. *Id.* at 423. Nevertheless, after finding that the Government could have withheld the permission completely, *id.* at 424, the Court upheld the conditions. "In our view this 'is the price which [applicants] must pay to secure the right to maintain their dam.' " *Id.* at 427-28 (quoting *Fox River Co. v. Railroad Comm'n*, 274 U.S. 651 (1927), which reviewed and upheld a similar state permit condition).

The parallels between *Appalachian Power* and this case are striking in several relevant respects. The legislature in each case acted to protect inalienable water-related public rights. Both permittees complained that the conditions imposed were not closely enough related to protection of those public rights.[4] In each case the conditions had an

[3] The Nollans rely on early cases dealing with fees and assessments as providing the basis for their proposed analysis. *See* Brief of Appellants 22-26. These cases are particularly inapposite in the permit condition context because they concern monetary assessments imposed unilaterally on prior existing uses and activities.

[4] *Appalachian Power* involves Commerce Clause and Tenth Amendment issues as well as claims under the Takings Clause. The primary concern of the Court, in dismissing the argument that the conditions were unrelated to problems of navigability, was to affirm the broad power of Congress to regulate the nation's waters in a manner not directly related to "control for navigation." 311 U.S. at 426. In so doing, however, the Court presumed and was untroubled by the regulating agency's power to impose permit conditions which did not di-

obvious relation to the broader power the legislature was asserting. *Id.* at 427. Both legislatures exercised that broader power to provide coordinated control and planning over all development affecting the public's special rights. *Id.* at 426. The statutes involved in both cases require permittees to acknowledge public rights in waterfront lands. *Id.* at 427.

Appalachian Power has recently been applied to uphold the constitutionality of similar permit conditions. See *United States v. 5.96 Acres of Land*, 593 F.2d 884 (9th Cir. 1979); *Portland General Electric Co. v. Federal Power Comm'n*, 328 F.2d 165 (9th Cir. 1964). The Court of Appeals in *Portland G.E.* relied on *Appalachian Power*, in denying claims essentially indistinguishable from the Nollans'. 328 F.2d at 173. The petitioners challenged permit conditions giving the United States the right to appropriate, free of cost, fast lands, rights-of-way, and rights of passage through and around the petitioners' dams, as well as free electrical power.[5] 328 F.2d at 169 n.5.

The property owners in *Portland G. E.* argued, much as do appellants here, that such conditions could only be applied to alleviate obstruction to navigation caused by the projects. *Id.* at 172. They urged that imposition of the conditions could only be justified by express findings of fact that the project obstructed navigation and the conditions were necessary to address that problem. *Id.* at 173-74. The government action amounted to a taking, they argued. *Id.* at 173. The court, squarely relying on *Appalachian Power*, found these claims meritless: "they must

rectly relate to burdens, e.g. navigation problems, arising from the project.

[5] The permit conditions were imposed pursuant to Section 11 of the Federal Power Act, 16 U.S.C.A. §804. Section 11, notably, authorizes such conditions when the Federal Power Commission deems them "reasonably necessary to promote the present and future needs of navigation."

accept the license upon such terms as Congress has determined should be imposed in the public interest." *Ibid.* Like the Nollans, the petitioners were "not required to accept the tendered license." *Ibid.*

Courts must of course be open to claims, absent from this case, that the development permit is necessary to prevent a loss of the property's beneficial use or is voluntary in form only, or that the condition in effect penalizes the exercise of specially cherished constitutional rights. *Cf. Perry v. Sinderman*, 408 U.S. 593 (1972); *Sherbert v. Verner*, 379 U.S. 398 (1963); *Speiser v. Randall*, 357 U.S. 513 (1958). These circumstances would make the permit application functionally mandatory. The *Appalachian Power* analysis would then be inapplicable. Such unilateral impositions, if substantial and unforeseeable, properly engender concerns about the possibility of a taking. The appellants here, however, have made no showing that the reasonable beneficial use of the property is at stake. And they have not claimed they were *compelled* to undertake this project, despite the contrary suggestion of the Solicitor General on their behalf. Brief for the United States as *Amicus Curiae* ("Br.U.S.") 19.[6] Nor does the burden of a permit restriction, even one that provides access to private property, raise a genuine concern about "unconstitutional conditions" simply because the applicant

[6] The Solicitor General apparently sees support in *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926), for his cautionary suggestion to this effect. Brief of the United States as *Amicus Curiae* 19. This misses the historical context of *Frost*. *Frost*, over the vigorous dissent of Justice Holmes joined by Justice Brandeis, lies squarely in the Lochnerian tradition of economic substantive due process review. The case rests on an intrusive second-guessing of legislative purpose, long since repudiated by this Court. *See Parks v. Watson*, 716 F.2d 646, 666 (1983) (Wallace, J., dissenting); *see also* Part III.B., *infra*. The prior owner's insistence that the Nollans agree to upgrade their use of the property if they purchased it did not compel their purchase and permit application, and cannot be the source of a constitutional right to compensation.

does not receive monetary compensation. This Court considered, and had no difficulty in rejecting, just such a claim in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984).

Subjecting permit conditions like the one at issue here, as distinct from unilaterally imposed conditions, to takings analysis would force a serious disincentive on legislatures and administrative agencies. If they could disapprove a development or other activity, for example because of its harmful impact, they must be free to utilize conditions they decide will alleviate that impact. Otherwise, they will lose the ability to accommodate competing public and private interests, and often will choose to deny intensified development altogether, even by those owners who would not object to permit conditions.

II. BECAUSE OF ITS MINIMAL INTERFERENCE WITH APPELLANTS' REASONABLE EXPECTATIONS AND BENEFICIAL USE OF THEIR PROPERTY, THE PERMIT CONDITION WHICH CALIFORNIA APPLIED TO THEIR DEVELOPMENT AND TO THOSE OF ALL SIMILARLY SITUATED LOT OWNERS COULD NOT WORK A TAKING.

A. Regulatory Takings Occur Only When The Governmentally Imposed Burden Is Both Unusually Substantial And Violative Of The Owner's Reasonable Expectations.

Even viewed as a unilaterally imposed land use regulation, rather than as a permit condition, the restriction challenged here by the Nollans does not support a claim for invalidation or compensation. The burden the restriction places on the Nollans' use of their property is neither (a) unreasonably disruptive of their expectations, nor (b) unusually substantial.[7] The discussion below, of this Court's takings decisions, makes it plain that to work a taking the restriction would have to be *both* of these.

---

[7] See Parts II.B. and II.C., *infra*.

This Court has often repeated that governmental regulation necessarily involves the adjustment of rights for the public good. The resulting burdens are the inevitable concomitants of "the advantage of living and doing business in a civilized community." *See, e.g., Kirby Forest Industries v. United States*, 467 U.S. 1, 14 (1984); *Andrus v. Allard*, 444 U.S. 51, 67 (1979); *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922)(Brandeis, J., dissenting). Nevertheless, the Court has recognized that particularly onerous regulation can, in "extreme circumstances," work a "taking" of private property. *United States v. Riverside Bayview Homes, Inc.*, 106 S. Ct. 455, 459 (1986).[8]

In the face of a claimed taking by regulation or other restriction, the fundamental constitutional inquiry is whether the burdens are "*so substantial and unforeseeable*, and can so easily be identified and redistributed, that 'justice and fairness' require that they be borne by the public as a whole." *Kirby*, 467 U.S. at 14 (footnote and citations omitted and emphasis added). It has become axiomatic that this is in each case an "essentially ad hoc, factual" inquiry unaided by any "set formula." *Penn Central Transportation Company v. New York City*, 438 U.S. at 125. Three, by now familiar, factors of particular significance in this inquiry include the regulation's economic impact on the claimant and its interference with reasonable investment backed expectations, as well as the underlying character

---

[8] Whether a regulation that "goes too far," *Pennsylvania Coal*, 260 U.S. at 415, is best viewed literally or only metaphorically as a "taking," and exactly what remedy is available in such a case, are questions as yet unanswered by this Court, *Williamson County*, 473 U.S. at 185-86, but once again before it this Term in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, No. 85-1199. *Amici* here express no views on those questions, unnecessary as they are to the resolution of this case. References in this brief to regulatory "takings" follow the Court's usage. They refer to governmental impositions which cannot stand in the absence of compensation.

of the governmental action.[9] *See, e.g., Kaiser Aetna v. United States*, 444 U.S. at 175.

The summation provided by this Court in *Kirby* and quoted directly above lends some structure to the "ad hoc" judicial evaluation. It emphasizes that "justice and fairness" do not call for shifting the burden of even easily identifiable and redistributable burdens to the public unless two circumstances are present.[10] Regulatory restrictions (with the possible exception of a narrow class of "*per se*" takings) do not raise a takings problem unless they are both unusually "substantial and unforeseeable." *Kirby*, 467 U.S. at 14.[11]

---

[9] Interference with investment backed expectations appears to be a species of economic impact, rather than a wholly separate factor. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *cf.* Br.U.S. 12 ("three somewhat overlapping factors"). The reasonableness, however, of property owners' expectations about the use of their property and about governmental restrictions is so central a prerequisite to a finding of a regulatory taking that it merits separate discussion.

[10] The three "factors" this Court has frequently focused on in addressing takings claims are particularly significant precisely because they help to identify the extent to which regulations and restrictions were genuinely unforeseeable and are troublingly substantial. In the absence of either unforeseeability or substantiality, however, no purpose is served by proceeding further with the full, difficult, ad hoc, fact-bound takings inquiry.

[11] Whether a "*per se*" taking by "permanent physical occupation" is an exception to this rule may be a matter of semantics and at all events is immaterial to this case, because no such occupation is present here. *See* Part II.C.1., *infra*. *Loretto v. Teleprompter* expressly rested on the "character of the government action" factor, finding it determinative in that case. 458 U.S. at 426. The Court did not find a "substantial" burden in the more usual sense. The economic impact of the regulation was admittedly minimal. The burden, however, was not merely "substantial" but (*per se*) extreme, in chopping through every strand in the owner's "bundle" of property rights, and emptying the occupied space of any value to the owner. *Id.* at 435-36. *Cf. Andrus v. Allard*, 444 U.S. at 65-66 (destruction of only one "strand," even

If the consequences of a regulation are either insubstantial or reasonably expectable, the individual has no constitutional cause for complaint. Unforeseeable but insubstantial regulatory burdens are commonplace events, borne in some measure by everyone. "Government hardly could go on" if they were an occasion for compensation. *Pennsylvania Coal*, 260 U.S. at 413. Compensation for (or invalidation of) substantial but foreseeable burdens, on the other hand, would result in private windfalls at the public expense. One who purchases land known to be subject to a building restriction pays a price already discounted by the market, and has no separate constitutional claim for compensation.[12] *Cf.* Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just*

---

of a significant one, not a taking). Moreover, while the Court did not dwell on this point, the owner had purchased the property before enactment of the offending statute, at a time when Teleprompter had paid owners for the right to maintain its "physical occupation." *Loretto*, 458 U.S. at 421-23. The regulatory burden was thus unforeseeable when the property was bought. Moreover, the holding includes an express finding of "historically rooted expectations" of compensation attaching to such occupations. *Id.* at 441. It is not at all plausible that "justice and fairness" would dictate compensation for or invalidation of a regulation authorizing a permanent occupation that had genuinely been foreseeable, to the complainant and to others, all along.

[12] The question of when the Takings Clause is offended by a change of expectations *during* an individual's ownership is a difficult one not necessary to the resolution of this case. Cases dealing with aspects of this problem include *Ruckelshaus v. Monsanto Co.*, 467 U.S. at 1008-10; *Andrus v. Allard*, 444 U.S. 51 (1979); *Jacob Ruppert v. Caffey*, 251 U.S. 264, 301-03 (1920); *Euclid v. Ambler*, 272 U.S. 365, 394-395 (1926); *Hadacheck v. Sebastian*, 239 U.S. 394, 410 (1915); *Mugler v. Kansas*, 123 U.S. 623, 672 (1887); *see also HFH Ltd. v. Superior Court of Los Angeles County*, 15 Cal. 3d 508 (1975), *cert. denied*, 425 U.S. 904 (1976). They strongly suggest that when a change in governmental regulation reflects a change in what is generally perceived as a harmful use of property, individual property owners' expectations must also change, if they are to be viewed as reasonable. *See also Penn Central*, 438 U.S at 144-45 (Rehnquist, J., dissenting).

Compensation" Law, 80 Harv. L.Rev. 1165, 1238 (1967); *see also* Part II.B., *infra*, at 16.

This Court has never held that either of these two elements sufficed to trigger a taking, in the absence of the other. *Penn Central* notes that cases analyzing "land use regulations which . . . are reasonably related to the promotion of the general welfare, uniformly reject the proposition that diminution in property value, standing alone, can establish a 'taking.' " 438 U.S. at 131, citing *Euclid v. Ambler Realty Company*, 272 U.S. 365 (1926) (75% diminution in value), and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (87 1/2 % [in point of fact 92 1/2 %] diminution in value). In *Agins v. Tiburon*, for example, the Court reviewed a case in which the magnitude of the regulatory burden was, though undetermined, undeniably substantial. Nonetheless, the Court expressly held that because the appellants were "free to pursue their reasonable investment backed expectations" they had not been denied the "justice and fairness guaranteed by the Fifth and Fourteenth Amendments." 447 U.S. at 262-63.

Outside the land use context, Justice Holmes held for the Court in *Erie R. R. Co. v. Public Utilities Comm'rs*, 254 U.S. 394, 410-11 (1921), that a total and disastrous diminution in value did not offend the Constitution. "If it reasonably can be said that safety requires the change . . . neither prospective bankruptcy nor engagement in interstate commerce can take away this fundamental right of the sovereign of the soil." And in *Ruckelshaus v. Monsanto*, the Court could not have been more explicit that the absence of a reasonable (investment backed) expectation, by itself "disposes of the taking question." 467 U.S. at 1005 (referring to the specific facts of that case). The Court never reached the question of the substantiality of the losses sustained.

Decisions of this Court also establish that the unforeseeability of a regulatory burden is not itself enough to

ground a takings claim, in the absence of an unusually substantial impact on the claimant (or the claimant's property). "[O]ur cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations." *Connolly v. Pension Benefit Guaranty Corp.*, 106 S. Ct. 1018, 1025 (1986)(quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976). Thus, federal regulations prohibiting the sale of artifacts previously acquired with the expectation, and for the purpose, of just such a sale withstood a takings challenge in *Andrus v. Allard*, 444 U.S. 51 (1979). The claim of the landowners in *Penn Central* that their property was taken because they had lost "the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." 438 U.S. at 130.

Zoning regulations are a classic example of the constitutionality of disappointing a current owner's expectations. *See, e.g., Euclid v. Ambler*, 272 U.S. 365. This Court has, with a single exception, uniformly upheld the application of such regulations. *See* Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 Urb. L. 447, 454 (1983). The reason for these results is that unilateral expectations are not property interests entitled to constitutional protection.[13] *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980).

Viewed in light of these cases, the California Coastal Act's restriction on new development is unexceptional. The

---

[13] The states, arguably, have even greater freedom than the federal government in disappointing property holders' expectations, owing to their residual authority to define "property" in the first instance. *Compare PruneYard Shopping Center v. Robins*, 447 U.S. 74, 84 (1980) with *Hudgens v. NLRB*, 424 U.S. 507 (1976) and with *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972); *see also Ruckelshaus v. Monsanto*, 467 U.S. at 1012 (noting limits on Congress' ability to "pre-empt" state property law).

discussion below shows that the burden the Act imposes was not unforeseeable at all, nor is it so substantial that it would work a taking had it been unforeseeable. It is a conventional, tolerable, and foreseeable exercise of the police power, designed to buffer, in part, the public's constitutionally protected interests in the shoreline from the ill effects of increasingly intensive private development.[14]

B. Appellants' Takings Claim Fails Because The Application Of California's Coastal Act To Their Property Did Not Interfere With Their Reasonable Expectations.

The Nollans took their property with full knowledge of the statutory restrictions on development. In fact, they initiated this challenge to the legality of those restrictions prior to purchasing the property. J.A. 14. They therefore cannot be said to have had any reasonable expectation that they would be regulated any differently than their neighbors. This lack of expectations is fatal to their claim.

The appellants' claim here parallels, although it is weaker than, that of the claimants in *Ruckelhaus v. Monsanto*, 467 U.S. 986 (1984). *Monsanto* held, for reasons also present in this case, that except where the government had created an explicit guarantee that interested parties would not have access to the regulated property, the owner had no reasonable, investment backed expectation that it could prevent such access or claim compensation. *Id.* at 1006-11. The Court found that Monsanto (like the Nollans) might have had a state-defined property right. *Id.* at 1003-04. Significantly, the Court noted that the right to exclude others was particularly essential to that specific form of

[14] *Cf. Agins v. Tiburon*, 447 U.S. at 261 ("The specific zoning regulations at issue are exercises of the city's police power to protect the citizens of Tiburon from the ill effects of urbanization"); *see also Euclid v. Ambler*, 272 U.S. at 394-95 (apartment buildings, constructed to take advantage of the open and attractive environment of a residential district, may by their height and bulk progressively destroy the very environment of which they sought to take advantage).

property interest. *Id.* at 1011. Nevertheless, the Court found the absence of reasonable expectations to be controlling and rejected the owner's takings claim. *Id.* at 1005.

Following enactment of the governing legislation, Monsanto's expectations concerning property thereafter acquired or submitted to the regulatory process were reasonable only insofar as they took the legislation into account. *Id.* at 1006. But even as to property developed and regulated before the statutory scheme provided for access, Monsanto had no reasonable, investment backed expectations, given the history of significant government regulation and great public concern over the potential adverse effects of the activity in which Monsanto was engaged. *Id.* at 1008; *cf. Connolly*, 106 S. Ct. at 1027 ("Pension plans were the object of legislative concern long before the passage of ERISA ... [when ERISA was amended in 1980] ... [p]rudent employers then had more than sufficient notice ...."

These factors found decisive in Monsanto are all present in this case. The most significant is the express, statutory access condition applicable at the time the Nollans took title to their property. But since 1879, long before passage of the Coastal Act, the California Constitution has guaranteed the public's access to the state's beaches.[15] More recently, public concern over the disappearance of beaches and beach access, *see* J.A. 65, resulted in the passage of the statewide referendum which eventually provided the basis for the Coastal Act at issue in this case. *Id.* at 355-56. Moreover, it has been established that beachfront construction interferes not only with access, but also, espe-

[15] Article X, Section 4 of the California Constitution provides in relevant part: "The People Shall Always Have Access To Navigable Waters. No individual, partnership, or corporation, claiming or possessing the frontage ... of ... navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ...."

cially when it includes seawalls and other locally protective structures, with preservation and replenishment of the beaches themselves. *Id.* at 72, 366-67. Thus, even if the appellants here had acquired their land before enactment of legislation which included access requirements for new developments, subsequent application of such requirements to them would not have interfered with their reasonable expectations. In point of fact, both the owner at the time of enactment, the Faria Family Partnership, and the owner from whom the Nollans purchased the lot, the Faria Trust, not only acquiesced in, but helped to formulate this precise implementation of the statutory access requirement. *Id.* at 312, 321-22.

Viewed as a question specifically of *investment backed* expectations, appellants' claim here is even weaker. The applicability of the access requirement was known to both parties to the transaction by which the Nollans acquired the property. If the restriction interfered with the property's value, and hence with some investment, it must have done so at the time of that transaction. Thus it would have lowered the price the Nollans paid or should have paid for the property. Their reasonable investment backed expectations cannot have been interfered with. To immunize them from the restriction applicable to their property when they bought it would simply be to grant them a windfall. Notably, the owners at the time the restriction became applicable have not joined in this action, although they have been co-applicants for development permits. *Id.* at 48.

On the specific facts of this case, other factors also contribute to a lowering of whatever expectations appellants had or have for their claim to exclusive use of a portion of the beach in front of their seawall. The extent of their beach ownership is uncertain. This is in part because of uncertainties surrounding the location of the mean high tide line, below which the beach is completely public. *Id.* at 85-86. The tide seasonally reaches to appellants'

seawall, *id.* at 67, and the mean high tide line may even lie landward of that wall, meaning that appellants may be encroaching on publicly owned lands. *Id.* at 85. There is also a substantial possibility that any dry sand beach that once attached to the appellants' parcel has long since been impliedly dedicated to public use by prior owners. *Id.* at 86. Finally, as a result partly of development along the coast, Faria Beach is being progressively eroded. *Id.* at 72-73. The mean high tide line is thus creeping inland, and any private holdings of dry sand are disappearing.

C. Transient Public Passage Across The Strip Of Beach The Appellants Claim To Own Is Not A Substantial Burden On Their Property Rights.

1. No "Permanent Physical Occupation"

The change in the Nollans' asserted right to exclude the public altogether from a portion of the beach is not a taking by "permanent physical occupation." *Cf. Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 441 (1982). *Loretto* adopts a distinction between a user who "passes to and fro . . . [whose] . . . use and occupation thereof are temporary and shifting," and one whose use is "permanent and exclusive." *Id.* at 428-29. At least when the invasion does not rise to the level of a permanent and exclusive physical occupation, it is subject to the same "ad hoc" analysis called for by other regulatory takings claims.[16] *Id.* at 432 and 435 n.12. That analysis does recognize that physical invasions may be "unusually serious" government authorized actions. *Id.* at 426; *but cf.* Michelman, 80 Harv. L. Rev. at 1186-87. But it does not call for compensation or invalidation in the absence of a burden which is both unforeseeable and unusually substantial.[17]

---

[16] *See also supra*, at 10 n.11.

[17] The kind of analysis undertaken by this Court in *Kaiser Aetna* and *PruneYard* illustrates this point. In *Kaiser Aetna*, although the government had the power to withhold project approval altogether (444

Appellants attempt to characterize the "pass and repass" provision at issue here as more egregious in its application to them than was the statute found to work a taking in *Loretto*. Brief of Appellants ("Br.A.") 19-20. The implication seems to be that this, too, is a "*per se*" taking by permanent physical occupation. The appellants' brief blurs over the distinctions made in *Loretto*, and ignores the plain language of the opinion. An "easement of passage, not being a permanent occupation of land" is not, without more, a taking of property. *Loretto*, 458 U.S. at 433. The deed restriction imposed on appellants' development project is apparently somewhat less, even, than an easement of passage. *See* J.A. 48. The occupation authorized by the statute in *Loretto*, however, was considered fundamentally more intrusive than an easement and, only by virtue of that extra intrusiveness, a taking *per se*. *Loretto*, 458 U.S. at 441.[18]

2. Insubstantial "Physical Invasion"

The public's temporary and shifting passage is not a substantial burden on the Nollans, given the history and physical characteristics of the disputed strip of sand. As in *PruneYard Shopping Center v. Robins*, the owners here have failed to demonstrate that excluding others from the beach is an essential component of the use or economic

U.S. at 179) before construction began, the Court found that official consent led to the fruition of property expectancies sufficiently important *in that case* to warrant constitutional protection. *Id.* at 179-80. At stake were the construction costs and the petitioner's ability to recoup them by charging an annual fee of all users. *See id.* at 180. In *PruneYard*, by contrast, a comparable "physical invasion" was found not to constitute a taking. The Court carefully distinguished *Kaiser Aetna*'s demonstrated interference with "reasonable investment backed expectations," and pointed to the inadequate showing of any burden, by the shopping center. 447 U.S. at 84.

[18] The "very narrow" holding of *Loretto*, 458 U.S. at 441, appears, at all events, to conceive of "permanent physical occupations" as involving "a fixed structure on land or real property." *Id.* at 437.

value of their property. *See* 447 U.S. 74, 84 (1980). The Nollans have not attempted to exclude the public in the past. J.A. 67. It is not, in fact, clear how they could confidently have done so. The strip of beach in question lies below the Nollans' eight foot seawall. J.A. 61, 270. It directly abuts, if it is not included in, the intertidal zone open to full public use. The border between the public and private land is uncertain, as the Nollans' title reflects. The Nollans could not have known, therefore, from what portion of the beach they could lawfully exclude the public. *See* J.A. 61-62.

The relative unimportance of the asserted "physical invasion" in this case is also evident in the minimal impact of the access condition on the Nollans' expectations of privacy.[19] The pass and repass provision could not have materially altered the privacy the Nollans would have enjoyed on the beach itself.[20] The publicly owned intertidal beach is at most a few feet away. J.A. 61. Equally significantly, people passing along the disputed strip would be close to the eight foot seawall and therefore partially or completely obscured from view, from the Nollans house above. They would thus impinge less on the privacy of the Nollans' home than those already out in plain view on the clearly public portion of the beach.

Any argument that might be made to distinguish this case from one which, like *PruneYard*, 447 U.S. 74 (1980) involved large scale commercial interests, because of the involvement of private citizens and a private residence, would misapprehend the facts of this case and lead to unreasonable results. Here, at the time of the legislative

[19] Expectations of privacy are, of course, much of the reason why the right to exclude is such a treasured stick in the Hohfeldian bundle of property rights. *Cf.* Michelman, *supra* p. 11, at 1228; *id.* at n.109.

[20] The "pass and repass" limitation on the access condition specifically addresses the proximity of residential use. Cal. Public Resources Code 30214(a)(3).

enactment the property owner was the Faria Family Partnership. J.A. 312. The Partnership owned the entire Faria Tract which it then sold to the Faria Trust. The Trust then subdivided the ownership, in effect, to numerous individuals like appellants. *Id.* at 47.

To treat the Nollans differently because they, rather than the subdivider, now hold title to the land, would be to allow the creation of new rights against the state by the expedient of dividing a parcel up into smaller segments. That, of course, would vitiate the very distinction sought to be maintained. It would allow easy circumvention of, for example, governmentally imposed density requirements like those upheld in *Agins*. 447 U.S. at 262. Cases like *Agins* should not be subject to multiple complete relitigation simply because the owner sold off several undeveloped portions of the property. Such a result would also violate the necessary and established principle that takings jurisprudence "does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Penn Central*, 438 U.S. at 130.

3. No "Diminution of Value"

This case presents no evidence at all of a diminution in value in the complainants' property. The routine application of the Coastal Act's access requirement to all similarly situated properties was clear at the time of purchase. J.A. 48. What the Nollans have lost, then, is at best the possibility a windfall increase in the property's value.

At all events, the significant inquiry for constitutional purposes, in the face of claimed diminution of value, is the amount of residual "reasonable beneficial use" in the parcel as a whole. *See Penn Central*, 438 U.S. at 130-31; *Williamson County*, 473 U.S. at 194. The access condition could not greatly alter the Nollans' use of the beach. Because even this upper strip of sand is subject to tidal action (J.A. 61, 67), the Nollans could not have occupied it continuously themselves.[21] And the permitted construction of a year round residence incontestably increases their beneficial use of the parcel as a whole.

III. THE PERMIT CONDITION APPELLANTS CHALLENGE MEETS THE ONLY FEDERAL CONSTITUTIONAL STANDARDS GOVERNING THE RELATIONSHIP OR NEXUS BETWEEN SUCH CONDITIONS AND THE PROBLEMS CREATED BY THE PROPOSED ACTIVITY.

A. Permit Conditions Which Do Raise Takings Questions Are Subject To The Same Analysis As Other Restrictions, Not To A Specially Heightened Takings Scrutiny.

When takings scrutiny of a permit condition *is* appropriate, for example, because the government compels the permit application, or because the permit is necessary to maintain the property's reasonable beneficial use, no different takings standard or analysis is called for simply because a *condition* is involved. Courts are already well-equipped to review charges that a permit condition involves a singling out of an individual, a physical invasion, or a governmental acquisition of a benefit. The established analysis of regulatory takings claims outlined above already takes account of such factors. If a permit condition passes that scrutiny, then it satisfies the Takings Clause.[22]

The landowners here, however, would import into the takings inquiry a special, heightened scrutiny of permit conditions. The Nollans propose that courts carefully meas-

---

[21] If the Nollans' asserted concern about being left with nothing but the litter and liability from public use, Br.A. 28, were sincere, the Coastal Act provides a straightforward solution. By formally offering to dedicate an easement across the beach, rather than simply entering a deed restriction, the Nollans could now throw both of those burdens onto public agencies. *See* Cal. Public Resources Code §30212(a).

[22] It may, of course, still run afoul of due process, if it is arbitrary enough, i.e., if it is a wholly irrational means to the legislative end. *See* Part III.B., *infra*.

ure such conditions against "special benefits to the property or special public needs caused by the property owners." Br.A. 25. These two, they suggest, must be "in proportion." *Id.* at 22. The government, apparently, would carry the burden of proof to justify each individual application of a permit condition requirement. *Id.* at 25.

The Nollans are joined by the Solicitor General, on behalf of the United States as *amicus curiae*, who proposes that the Takings Clause should call for an even more elaborate investigation. That investigation would require courts to decide whether such conditions are "carefully linked" (Br. U.S. 24) to the same legislative purpose that would be served by denying the permit *and also*, in both kind and degree, to specific problems created by the particular permitted activity. *Id.* at 22-23. The Nollans' proposal, and the Solicitor General's, are analytically unsound, without foundation in the holdings of this Court, and demonstrably unwise.

The position of the Nollans and the Solicitor General, if accepted, would establish a heightened takings scrutiny of land use control exactly when it is least called for. Whenever a legislature chooses to utilize permit conditions[23] rather than another form of regulation, courts would look for a demonstrated close fit between specific regulatory burdens and project impacts. This is a fit unquestionably

---

[23] Unlike the Solicitor General, the Nollans do not clearly tie their theory exclusively to permit conditions. They refer broadly to undefined "special burdens," Br.A. 23, "special costs," *id.* at 25, and "special obligations," *id.* at 28. Their concern, however, appears to be focused on permit conditions, as was the lower courts'. The trial court, which they urge be affirmed, would require that any "access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access." J.A. 415. The Court of Appeal, which the Nollans ask be overruled, rejected this requirement of a direct relationship in each case. *Id.* at 424. At one point, however, the Nollans do suggest that a far less intrusive test of "no reasonable relationship" is the constitutional standard. Br.A. 29.

not required of, for example, zoning ordinances. On this theory a restriction on property owners' rights that passed ordinary takings scrutiny if unilaterally imposed would still require special justification if it were implemented as a permit condition.

This theory would attach special limitations to a legislature's ability to regulate in just those circumstances where the burden on the regulated entity is most clearly alleviated. When a restriction is incorporated in a permit, the landowner is assured of some return benefit. A regulatory burden which would pass takings scrutiny in the absence of such a reciprocal benefit cannot reasonably be held to a higher standard of takings review when an explicit and definable benefit is incorporated with it. *Cf. Wickard v. Filburn*, 317 U.S. 111, 133 (1942)("That appellee is the worse off for the aggregate of this legislation does not appear; it only appears that if he could get all that the Government gives and do nothing that the Government asks, he would be better off than this law allows."). Nothing in the Takings Clause as this Court has interpreted it, calls for such a quixotic second-guessing of legislative land-use decisions.

Neither the Nollans nor the Solicitor General have found relevant case authority for their theories. The special assessment cases upon which the Nollans rely are both inapposite (because they involve unilateral impositions) and outmoded (because of their ties to economic substantive due process). But even these cases found only those assessments objectionable which were "without *any* compensating advantage," *Georgia Railway & Electric Co. v. Decatur*, 295 U.S. 165, 170 (1935), "*solely and only* for the purpose of deriving revenue," *Myles Salt Co. v. Board of Commissioners*, 239 U.S. 478, 483 (1916), or "in *substantial* excess of the special benefits accruing," *Norwood v. Baker*, 172 U.S. 269, 279 (1898) (emphasis added to all three quotations).

The Solicitor General's argument similarly rests on cases from other contexts and other times. *Nashville, C. & St. L. Ry v. Walters*, 294 U.S. 405 (1935), for example, simply holds that given the extraordinary evidence offered by the appellants, the state courts should at least have considered their straight due process claim that a unilateral assessment was arbitrary and capricious. *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926) as noted *supra* at 7 n.6, is solidly Lochnerian. *Stephenson v. Binford*, 287 U.S. 251, 272 (1932), a partial retreat from *Frost*, says unequivocally that the "extent to which, as means, [the permit provisions] conduce to that end, the degree of their efficiency, the closeness of their relation to the end sought to be attained, are matters addressed to the judgment of the legislature and not to the that of the courts." *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893), concerns whether the federal government must pay for state-created property rights taken over in eminent domain proceedings. It simply does not address the question of which land use regulations are unconstitutionally burdensome.

If anything cited in the Solicitor General's brief supports his theory, it is this Court noting in passing that a zoning ordinance can effect a taking if it "does not substantially advance legitimate state interests, see *Nectow v. Cambridge*, 277 U.S. 183, 188 (1928) or denies an owner economically viable use of his land [citation omitted]." *Agins v. Tiburon*, 447 U.S. at 260. This Court however, has not read *Nectow*, a frankly substantive due process case rather than a takings claim, as a justification for second-guessing a legislative choice of means. At most it means that assertions of the public health, safety, or welfare must be more than illusory. Certainly it does not require the government to tie each application of an ordinance to specific evils. The Court in *Agins*, for example, easily found that the ordinances substantially advanced legitimate governmental goals. *Id.* at 261. The city government was not

expected to show how each particular project would tangibly and adversely affect the specific public interests being asserted. *See id.* n.8.

The Solicitor General suggests that "the terms of a condition that would excuse compliance with the restriction may indicate that the actual purpose is unrelated to the purported police power goal." Br.U.S. 22 n.20. This suggestion is wholly inapt in this case, given the complete lack of evidence to suggest such a subterfuge. *See Hadacheck v. Sebastian*, 239 U.S. at 414 ("We must accord good faith to the city in the absence of a clear showing to the contrary."). Moreover, as a justification for a general doctrine of stricter takings scrutiny, the theory ignores the possibility that the permitted activity has certain identifiable and remediable adverse impacts which can be effectively addressed by the attachment of conditions. It also arrogates to the judiciary the legislative task of striking a balance between competing public and private interests. There is nothing constitutionally offensive in the government deciding to tolerate a certain level of adverse impact on the public interest, in response to the needs of individual citizens or to avoid potentially unconstitutional deprivations. Nor is there any justification for heightened judicial scrutiny each time the legislature or its delegated agency decides that some adverse impact is tolerable if partially offset by a public gain.[24]

The thrust of appellants', and their *amicus'*, position is actually a due process concern, not a takings claim. They are urging a rigorous, economic substantive due process analysis in the permit condition context, apparently as an expansion of the Takings Clause's fairness inquiry. They propose that courts closely examine the effectiveness and

---

[24] *Cf. Berman v. Parker*, 348 U.S. 26, 32 (1954) ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

the raticnality of a legislative choice of means to an end. The Solicitor General's proposal goes further. It would include a judicial re-evaluation of the legislature's determination that the end served, the public purpose, was weighty enough to justify the choice of a particular kind of means. Perhaps these proposals are presented to the Court in the guise of takings doctrine with the hope that they will not be recognized as urging the resurrection of a discredited mode of due process analysis. The analysis, however, is equally ill-conceived and counter to this Court's teachings, whether conducted under the rubric of takings law or as an aspect of due process.

B. The Relevant Constitutional Inquiry Specific To Ordinary Permit Condition Requirements Is Whether, As A Matter Of Due Process, The Condition Is So Unrelated To The Legislative Goal As To Be Arbitrary And Irrational.

The United States Constitution does provide for some judicial scrutiny of a legislature's choice of means to an end, where that choice allegedly interferes with property rights. The Due Process Clauses require that such action not be "wholly arbitrary or irrational."[25] *Martinez v. California*, 444 U.S. 277, 282 (1980), *accord Zahn v. Board of Public Works*, 274 U.S. 325, 328 (1927) (zoning ordinance which greatly affected market value was not "clearly arbitrary and unreasonable"). A presumption of constitutionality, however, attaches to such a choice. *Bibb v. Navajo Freight Lines*, 359 U.S. 520, 529 (1959). This leaves on a complainant the burden of showing arbitrariness or

[25] Where an administrative decision maker has broad discretion in making individualized determinations, procedural due process may be implicated. Tribe, *American Constitutional Law*, 511 (1978). The classification scheme can also be attacked for failure to comport with the Equal Protection Clauses. *See, e.g. Williamson v. Lee Optical Co.*, 348 U.S. 483, 489 (1955). The applicable standards of review parallel those discussed below for due process claims. *See, e.g., Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974).

irrationality. *See, e.g., Hadacheck v. Sebastian*, 239 U.S. at 410 ("in any given case it must plainly appear to apply"). Here, the Nollans have not overcome this presumption, nor did the trial court so find. To the contrary, the trial court applied a much higher standard, and shifted the burden to the government. "A valid access condition must be supported by an evidentiary showing of direct and definable adverse impact on public access." J.A. 415. The Court of Appeal correctly held this standard inapplicable. J.A. 424.[26]

The strictures of due process do not, however, authorize judicial inquiry into the wisdom of legislation. *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963). As noted above,[27] the theory of the Nollans (and even more so, that of the Solicitor General) would require exactly such an inquiry. By arguing that the access requirement is only constitutional if the state "demonstrates that the need . . . directly results from the action the Nollans proposed," Br.A. 12, the Nollans challenge the remedial effectiveness of the permit condition. Since the legislature unequivocally required such conditions (in the absence of demonstrated alternatives—a determination not challenged by the Nollans here), the essence of the Nollans' claim is "whether *in fact* the provision will accomplish its objectives." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 242 (1984) (quoting *Western & Southern Life Ins. Co. v. State Bd. of Equal-*

[26] Because some of the elements of the Coastal Commission's permit action called for an agency decision, the Court of Appeal reviewed the administrative record for substantial evidence of the condition's reasonableness. J.A. 423. Because the Nollans argue, and the trial court held, that a demonstrated direct relationship is a constitutional requirement, J.A. 419, although nothing in the legislation requires or even suggests such a demonstration requirement as to "new development" (*see* Cal. Public Resources Code §30212), the claim before this Court is a challenge first to the legislation itself and only second to the administrative decision.

[27] Part III.A., *supra*.

ization, 451 U.S. 648, 671-72 (1981). To decide that claim, this Court, and subsequently lower courts, would have to sit as a "superlegislature," *Day-Brite Lighting, Inc. v. Missouri*, 342 U.S. 421, 423 (1952), a role this Court has repeatedly and consistently eschewed.[28] *See, e.g., Exxon Corp. v. Governor of Maryland*, 437 U.S. 117. 124 (1978).

This Court has already been faced with and rejected a federal constitutional complaint very like the Nollans', that land use measures are irrational or unreasonable because they are "not reasonably necessary for the prevention of the acts complained of," or because "the means adopted are out of proportion to the danger involved." *Hadacheck v. Sebastian*, 239 U.S. at 398-99. The Nollans' theory, unpersuasive in *Hadacheck*, is even more ill-advised where the legislature, as here, is addressing a problem of cumulative impact. The actual adverse impact of a pattern of development, and the contribution of a particular project to that impact, may well be demonstrable and quantifiable only after the damage is done. At that point remediation may be difficult or impossible. The distribution of remedial costs, moreover, is then a genuinely unilateral exaction

[28] *See also Moore v. City of East Cleveland*, 431 U.S. 494, 502 (1977) (plurality opinion of Powell, J., sounding a cautionary note, while undertaking a heightened substantive due process analysis in protecting family liberties, "lest the only limits to such judicial intervention become the predilections of those who happen at the time to be Members of this Court"). State courts are, of course, free to engage in more vigorous scrutiny under their state equivalents of the Due Process Clause. *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 461 n.6 (1981). Some state courts have in fact adopted a theory somewhat similar to the Nollans'. *See* Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119, 1124 (1964); Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 J. Urb. Contemp. L. 269, 284-86 (1983). Moreover, a number of states, including California, also extend analogous protections to landowners by incorporating such standards into zoning enabling acts and other legislation governing local land use controls. *See, e.g.*, Cal. Government Code §66475.4 (West 1987).

imposed on property owners. Project proponents would thus have no pre-construction assurance of the ultimate conditions or other costs that their development would entail.

Even where cumulative impact is prospectively ascertainable, it is not the role of the federal judiciary to determine whether a particular project is or is not desirable. *Berman v. Parker* 348 U.S. 26, 33 (1954). The policy decisions and scientific or technical considerations involved are for legislatures. *United States v. Twin City Power Co.*, 350 U.S. 222, 224 (1956). When this Court reviews the decisions of state courts of last resort an additional, similar deference attaches. "When the scope of the police power is in question the special knowledge of local conditions possessed by the state tribunals may be of great weight." *Nashville, C. & St. L. Ry v. Walters*, 294 U.S. at 433.

Even if the Nollans could affirmatively demonstrate that their project, taken alone, had no adverse impact,[29] that would not remove them from the regulatory jurisdiction of the police power or render the Coastal Act irrational as applied to them. The trivial contribution of each project does not and could not reasonably strip the legislature of authority to deal with the aggregate. *Wickard v. Filburn*, 317 U.S. at 127-28; *Stephenson v. Binford*, 287 U.S. at 270. Indeed, even if the Nollans' development were not "one more brick in the wall," Opinion of the California Court of Appeal, J.A. at 425, even if it did not contribute at all to the cumulative problem, due process would not necessarily be offended by its inclusion in the regulatory

[29] The California legislature has already found that, as a general matter, such an impact exists. Landowners challenging that determination are in effect seeking to establish their activities as exceptional. The burden of doing that could only lie on each landowner. Any other rule would put an impossibly high burden on legislative attempts to deal with widespread problems. Here, the appellants have made no such case.

plan. The legislation may well still be quite rational even if it restricts or prohibits individual cases of land use which "turn out to be innocuous in themselves." *Euclid v. Ambler*, 272 U.S. at 388. Legislatures are not held to "scientific precision," *Sproles v. Binford*, 286 U.S. 374, 388 (1932), either in the choice of remedial or preventive measures or in setting the scope of regulation.

CONCLUSION

For the foregoing reasons, the decision of the California Court of Appeal should be affirmed.

Respectfully submitted,

JAMES M. SHANNON
Attorney General

LEE P. BRECKENRIDGE*
NATHANIEL S. W. LAWRENCE
Assistant Attorneys General
Environmental Protection Division
One Ashburton Place
Boston, MA 02108
(617) 727-2265

Attorneys for Amicus Curiae
Commonwealth of Massachusetts

**Counsel of Record*

[Other Counsel Listed on Inside of Front Cover]

AMICUS CURIAE

BRIEF

Supreme Court, U.S.
FILED
FEB 7 1987
JOSEPH F. SPANIOL, JR.
CLERK

(18)

86-133

In The
SUPREME COURT OF THE UNITED STATES

October Term, 1986

JAMES PATRICK NOLLAN and
MARILYN HARVEY NOLLAN,

Appellants

v.

CALIFORNIA COASTAL COMMISSION,

Appellee

On Appeal from the Court of Appeal,
Second Appellate District,
State of California

AMICUS CURIAE BRIEF
of the COASTAL STATES ORGANIZATION
Joined by the
SOUTH CAROLINA COASTAL COUNCIL
In support of Affirmance

David C. Slade, Esq.
Counsel of Record
COASTAL STATES ORGANIZATION
444 North Capitol Street, N.W.
Suite 312
Washington, D.C. 20001
(202) 628-9636

Of Counsel

Donald L. Conners, Esq.
Choate, Hall & Stewart

Newman J. Smith, Esq.
South Carolina Coastal Council

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 8

ARGUMENT 16

I. APPELLEE'S CONDITIONING OF THE ISSUANCE OF APPELLANTS' DEVELOPMENT PERMIT ON APPELLANTS RECORDING ON THEIR DEED A PUBLIC PROPERTY INTEREST OF LATERAL PUBLIC ACCESS ACROSS THEIR BEACH FRONT PROPERTY IS NOT A "TAKING" IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION BECAUSE APPELLANTS NEVER POSSESSED THIS PROPERTY INTEREST IN THE FIRST PLACE. THIS PROPERTY INTEREST HAS FOREVER BEEN HELD BY THE PUBLIC. A PROPERTY INTEREST NOT HELD CANNOT BE TAKEN. 16

1. The Sandy Beach Portion Of Appellants' Property Is Subject To The Public Trust. 23

a) California Constitution and Statutory Law 26
b) Coastal Zone Management Act. 28

c) Judicial Opinions. . . . 31
d) Common Sense, Reasonableness, and the Nature of the Shoreland. .37
e) Summary. 41

2. Appellants As Owners of Shorefront Property Held It Subject to Different Legal Rules From Those Applicable To Inland Property. 43

a) Appellants possess this shoreland property subject to the Public Trust. 44

b) If there was an attempt to grant or sell this property interest to Appellants' predecessor-in-title free of the Public Trust responsibilities the attempt was an improvident grant. 50

c) Defining the public trust ocean shorelands as that strip of land between the mean high tide level and the mean low tide level would likewise be an improvident act beyond the power of a State to make. 54

d) Summary. 56

3. Public Trust Rights Are Held In Trust By The State For All Of The People Of The Nation. 57

CONCLUSION. 59

TABLE OF AUTHORITIES

CASES

Arnold v. Munday, 6 N.J.L. 1 (Sup. Ct. 1821). 51, 54

Boone v. Kingsbury, 206 Cal. 148 (1928) 58

Borax Consolidate Ltd. v. Los Angeles, 296 U.S. 10 (1935). . .12, 34

Boston Waterfront Development Corp. v. Commonwealth, 393 N.E. 2d 356 (Mass. 1979). . . . 48

City of Berkley v. Superior Court of Alameda, 162 Cal. Rptr 327, cert. denied, 101 S. Ct. 372 (1980). 27, 52, 54

District of Columbia v. Air Florida, 750 F.2d 1077 (1984). .10, 19

Gion v. City of Santa Cruz, 2 Cal. 3rd 29 (1970). 27

Grupe v. California Coastal Commission, 212 Cal. Rptr. 578 (1985). . 49

Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892). .passim

Lusardi v. Curtis Point Property Owners Ass'n., 86 N.J. 217 (1981). .23

Mallon v. City of Long Beach, 44 Cal.2d 199 58

Matthews v. Bay Head Improvement Ass'n., 471 A 2d. 355 (N.J. 1984). . . . . passim

Marks v. Whitney, 491 P.2d 374 (1971). 7, 10

National Audubon Society v. Superior Court, 33 Cal. 3rd 419 (1983) 9, 18, 42

Nollan v. California Coastal Commission, 177 Cal. App. 3rd 719 (1986) 49

Opinion of the Justices, 365 Mass. 685 (1974). 4

San Francisco v. Le Roy, 138 U.S. 656 (1890) 12, 22

Shively v. Bowlby, 152 U.S. 1 (1894). . . . . passim

State of Oregon ex rel Thornton v. Hay, 462 P.2d 671 (1969). . .20

State v. Superior Court of Lake City, 625 P.2d 239 (Cal. 1981). 19, 57

Van Ness v. Borough of Deal, 78 N.J. 174 (1978). 23

UNITED STATES CONSTITUTION

Fifth Amendment. 11

Fourteenth Amendment 11

Commerce Clause 57

Privileges and Immunities Clause . . 57

CALIFORNIA CONSTITUTION

Article X, section 4 . . 2, 26, 27, 31

Article 1, section 25 . . . . . 26, 31

STATUTES

Institutes of Justinian, 2.1.1. . .8, 17

Coastal Zone Management Act,
(16 U.S.C. 1454 (b)(7)). . . 2, 30, 50

North Carolina General Statutes
Sec. 113A-134.1 11

Cal. Pub. Res. Code Sec. 30000
et seq. 3

Cal. Stats. 1850, Ch. 95, p.215 . . . 11

Hawaii Rev. Stats Ch. 115 11

OTHER REFERENCES

A Proposed Comprehensive Beach Management Program for the State of Florida, Florida Department of Natural Resources (1986) 11

Carlson, J.F., The Public Trust and Urban Waterfront Development in Massachusetts: What is a Public Purpose, 7 Harvard Environmental Law review 71 (1983). 14

Coastal States Organization, America's Coasts, Progress & Promise (1985). 3

Connors, The Public Trust Doctrine: A Primer for the 1980s 8

General Accounting Office, National Efforts to Preserve the Nation's Beaches and Shorelines - A continuing Problem 1 (1975). 3

Moore, S., The History and Law of Fisheries 96 (1908). 38

Note, Public Beach Access: A Guaranteed Place To Spread Your Towel, 39 U. Fl. L. Rev. 853, 855 (1977). .24

Note, The Public Trust In Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L. J. 762 (1970). 40, 58

San Francisco Bay Conservation & Development Commission, San Francisco Bay Plan Supplement 434-443 (January, 1969). 6

Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C.D. L Rev. 185 (1980). 36, 51

Stevens, The Public Trust: A Sovereign's Ancient Prerogative Becomes the Peoples Environmental Right, 14 U.C.D.L.Rev. 195 (1980). .19

STATEMENT OF INTEREST OF AMICI CURIAE IN THE OUTCOME OF THIS CASE

The Coastal States Organization (CSO) and the South Carolina Coastal Council, as Amici Curiae, submit this brief in support of Appellee, California Coastal Commission, in seeking affirmation of the ruling of the Court of Appeal of the State of California, Second Appellate District. We base our brief on the Public Trust Doctrine.

The purpose of the Coastal States Organization is to provide the Governors of the several coastal States with a means to participate in the resolution of nationally significant coastal issues. The Organization took a leading role in the legislative effort to enact the federal Coastal Zone Management Act (CZMA). California's coastal zone management program,

administered by Appellee, was federally approved in accordance with the CZMA. The CZMA[1], the Constitution of the State of California[2], and the California coastal zone management program[3] require that the public have access to the coasts for recreational purposes.[4]

There is a profound human connection with the sea.[5] The public's right to enjoy the beaches of the nation is so intrinsically important that its unavailability, even in very limited circumstances, is a loss that can be measured in both economic and psychological terms. The desire to enjoy the

---

1. See CZMA, 16 U.S.C. 1454(b)(7)
2. Article X, Section 4.
3. California Coastal Act, section 30001:5(c).
4. See Public Access, Joint Appendix, 351.
5. "I must down to the seas again, for the call of the running tide is a wild call and a clear call that may not be denied." -John Masefield

coasts has brought millions of people to live along the shores. Since 1972, permission has been granted to construct more than 42,000 building units along California's coasts. Approximately 85 percent of California's population lives within 30 miles of the coastline. Over 50 percent of the U.S. population lives within the nation's coastal zone, with projections of an increase to 80 percent by the year 2000. Coastal States Organization, America's Coasts, Progress & Promise (1985). Private property accounts for about 70 percent of the U.S. shoreline, not including Alaska. General Accounting Office, National Efforts to Preserve the Nation's Beaches and Shorelines - A Continuing Problem 1 (1975). Much of this private ownership extends out to the sandy beach, some-

times to the mean high tide line,[6] sometimes to the mean low tide line.[7]

Private ownership of beach lands, if allowed to exclude people other than the owners and their guests, can foreclose any meaningful recreational use of beach areas by the public, turning public beaches, piece by piece, into de facto private beaches. Whereas the public has always enjoyed the use of the beaches, the people's need for recreation continues to grow with the rapidly expanding urbanization of the shore. The beach, however, is a finite resource. Without a solution, the conflict between public beach use and the

6. Appellants' property extends seaward to the mean high tide level.
7. Massachusetts recognizes private property grants to the "low-water mark" which has been interpreted to mean the "mean low water mark." See Opinion of the Justices, 365 Mass., 685 (1974).

rights of private landowners will continue to worsen. The resolution of this growing conflict should provide for development of the nation's coastal area in a manner that increases its value, while allowing for continued public recreational use. The Public Trust Doctrine provides such a resolution, allowing for development while offering the public and private coastal land owners access to the beaches. In addition, it lends certainty to private owners' expectations concerning the reasonable use and enjoyment of these beach areas.

In the course of the recent evolution of the Public Trust Doctrine in the United States, varying state court interpretations of the doctrine, in addition to the differing definitions of "public interest" and "public pur-

pose" offered in these state decisions, has created confusion. Shoreland titles and public rights are in a state of uncertainty. See San Francisco Bay Conservation & Development Commission, San Francisco Bay Plan Supplement 434-443 (January, 1969). As a result, the application of the Public Trust Doctrine, a principal, and sometimes only, means for protection of unrecorded property interests held by the public since the time of Statehood, remains uncertain. If the Public Trust Doctrine were to become a casualty of growth and development, future generations may find it increasingly difficult, if not impossible, to enjoy the ocean's shorelands.

Amici curiae urge this Court to consider the Public Trust Doctrine in resolving this case at bar. Although

this doctrine was not raised in the lower proceedings, this Court may take judicial notice of the public trust burdens on the portion of Appellants' property in question. See Marks v. Whitney, 491 P.2d 374,378 (1971). In fact, to render a decision in this case without recognizing and protecting the public's interests and rights would severely impair the public's rights to full use and enjoyment of the ocean shorelands, rights held in trust for the people by the State, as well as ignore vital judicially recognizable facts. The public's rights must be considered in order to properly decide the issues at hand. Application of the Public Trust Doctrine should lead to the affirmation of the Appellate Court of California specifically, while generally clarifying the rights of the

public and private landowners to the reasonable use and enjoyment of the nation's beaches and coastal lands.

SUMMARY OF ARGUMENT

The roots of the Public Trust Doctrine reach deep into Roman law. The doctrine, as understood in Roman times, provided that "[b]y the law of nature, three things are common to mankind - the air, running water, the sea and consequently the shores of the sea." Justinian Institutes, 2.1.1 - 2.1.6. See Connors, The Public Trust Doctrine: A Primer for the 1980s (April 1986).

Since these early beginnings, and especially in the last two decades in American jurisprudence, the doctrine has undergone a significant evolution. Whereas traditional public trust uses

included use of the shorelands and navigable waters for commerce, navigation and fishing, the scope of the doctrine has been expanded to include new uses, and indeed, what lands are considered to be in the public trust.

"It is well settled in the United States generally and in California specifically that the Public Trust is not limited to the reach of the tides, but encompasses all navigable lakes and streams." National Audubon Society v. Superior Court, 33 Cal. 3rd 419,435 (1983) and cases cited therein. Further, public trust uses have expanded from the traditional commerce, navigation and fishery. "The object of the public trust has evolved in tandem with the changing public perception of the values and uses of waterways." Id at

434. "The public uses to which tidelands are subject are sufficiently flexible to encompass changing public needs. In administering the trust the State is not burdened with an outmoded classification favoring one mode of utilization over another." Id, quoting Marks v. Whitney, 6 Cal. 3rd 251, 259-260. Thus, in the last two decades, swimming, boating and recreational activities have been recognized as added forms of the traditional definition of commerce - tourism. See District of Columbia v. Air Florida, 750 F.2d 1077, 1083 (1984); Matthews v. Bay head Improvement Ass'n, 471 A. 2d 355,363 (N.J. 1984). This is an important aspect of the Public Trust uses, because many of the coastal states consider their beaches, and the revenue (commerce) generated by the tourists

visiting those beaches, as one of their crown jewels.[8]

Appellants raise the question whether Appellees have committed a "taking" of property in violation of the Fifth and Fourteenth amendments of the U.S. Constitution by requiring Appellants to record a deed restriction acknowledging a right of public access to the public beach on their deed in order to receive permission to develop their beachfront property. Appellants' Brief, at i. Amici curiae respond that

---

8. See North Carolina General Statutes Sec. 113A-134.1, "The beaches provide a recreational resource of great importance to North Carolina and its citizens and this makes a significant contribution to the economic well-being of the State." See also A Proposed Comprehensive Beach Management Program for the State of Florida, Florida Department of Natural Resources (1986); Ch. 115, Hawaii Rev. Stats., "Public Access to Coastal and Inland Recreational Areas."

there is no "taking" because a property interest cannot be taken from someone who did not possess it in the first place.

This case involves publicly used shorelands, the beach portion of the Appellants' lot. Such lands are held by the State in trust for the benefit of the public.[9] "The control of the State for the purposes of the trust can never be lost, except as such parcels as are used in promoting the interests of the public therein, or can be disposed without any substantial impair-

9. An exception to this general rule in California is when "lands which had previously been granted by Mexico to other parties under the treaty of Guadulupe Hidalgo (9 Stat. 922). Borax Ltd. v. Los Angeles, 296 U.S. 10, 15 (1935). See also San Francisco V. Le Roy, 138 U.S. 656, 671; Knight v. United States Land Ass'n, 142 U.S. 161,

ment of the public interest inthe lands and waters remaining." Illinois Central Railroad v. Illinois, 146 U.S. 387, 453 (1892).

The grant of this public trust land to private hands would not promote the interest of the public. Further, such a grant would substantially impair the public's interest in the remaining public beaches in that access to them would be impaired, if not lost. This would render the remaining public beach a de facto private beach.

This is not to say that a State cannot alienate public trust lands to private holders, as it has done in the

---

(9. cont.) 183; Shively V. Bowlby, 152 U.S. 1; Summa Corporation v. California ex rel State Lands Commission, 466 U.S. 198 (1984). The shorelands in question in this case do not fall within this exception.

case at bar. A State may so alienate public lands, but it cannot simply grant title to a private holder in fee simple absolute. The State, through its legislature, holds public trust resources in perpetuity, retaining control over their development even after they are granted or sold to private parties. Carlson, J.F., The Public Trust and Urban Waterfront Development in Massachusetts: What is a Public Purpose, 7 Harv. Envt'l L. Rev. 71 (1983). The State holds title to the Public Trust easement on behalf of its citizens, and has subjected this State trust right to regulation under the authority of the California Coastal Act which is administered by Appellee. Holding these public trust resources in perpetuity, the State, regulating its own property rights through Appellee,

cannot be "taking" something from Appellants -- something Appellants never possessed in the first place.

Appellee's permit condition recognizes a property right of the State that always has existed; the right of the public to pass and repass. The condition does not create a new public right. Thus, this Court should recognize and use the Public Trust Doctrine to protect the general public's rights to pass and repass over the area seaward of Appellants' seawall, and should find that the Appellee's requirement to record a deed restriction for this Public Trust right is not a "taking" in violation of the U.S. Constitution.

ARGUMENT

I. APPELLEE'S CONDITIONING OF THE ISSUANCE OF APPELLANTS' DEVELOPMENT PERMIT ON APPELLANTS RECORDING ON THEIR DEED A PUBLIC PROPERTY INTEREST OF LATERAL PUBLIC ACCESS ACROSS THEIR BEACH FRONT PROPERTY IS NOT A "TAKING" IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION BECAUSE APPELLANTS NEVER POSSESSED THIS PROPERTY INTEREST IN THE FIRST PLACE. THIS PROPERTY INTEREST HAS FOREVER BEEN HELD BY THE PUBLIC. A PROPERTY INTEREST NOT HELD CANNOT BE TAKEN.

The Public Trust doctrine stands for the proposition that certain resources such as running water, shorelands and the sea are the common property of all. The doctrine originates from the Justinian code, a codification of the law by a commission appointed by the Roman Emperor Justinian around 527 A.D. This code provided, inter alia, that by the law of nature several things were common to all mankind:

> "[T]he public use of the seashore, as of the sea itself, is part of the law of nations; con-

sequently everyone is free to build a cottage upon it for pur- poses of retreat, as well as to dry his nets and haul them up from the sea. But they cannot be said to belong to anyone as pri- vate property, but rather are subject to the same law as the sea itself, with the soil or sand which lies beneath it." Institutes of Justinian, 2.1.1.

The Justinian code remained the definitive Roman law long past the death of Emperor Justinian. It endured not only the fall of the Roman Empire, but the invasion of Europe by the Germanic conquerors in the Middle Ages. The Justinian code found its way into French law, and from French law to Louisiana where its principles remain codified to this day. The code also found its way into Spanish law, which was brought to the western American continent, eventually becoming part of Mexican law, and finally embodied in the law of what was then known as "Alta

California." At the same time these principles advanced by way of England to the American colonies, and finally to the original 13 States. Under the English colonial law, both the title and dominion of the sea and the shores where the tides ebb and flow within the jurisdiction of the Crown of England vested in the King, as the representative of the nation and for the public benefit. It was understood at that time that the shorelands "where the tides ebb and flow" were those lands below the "high water mark."[9]

"In this country the Public Trust Doctrine has developed almost exclusively as a matter of state law. Tra-

---

9. For a thorough review of the origins and evolution of the Public Trust Doctrine, See National Audubon

ditionally, the doctrine has functioned as a constraint on states' ability to alienate public trust lands and as a limitation on uses that interfere with trust purposes." District of Columbia v. Air Florida, 750 F.2d 1077, 1082 - 1083 (1984). When California entered the Union, its legislature adopted a statute which provided that unless inconsistent with federal or State law, the "common law of England shall be the rule of decision in all the Courts of this State." Cal. Stats. 1850, Ch. 95, p. 215. See State v. Superior Court of Lake City, 625 P.2d 239, 242 (Cal.

(9 cont.) Society v. Superior Court, 33 Cal. 3rd 419, cert. denied sub nom Los Angeles Department of Water v. National Audubon Society, 104 S. Ct. 413 (1983). See also, Stevens, The Public Trust: A Sovereigns Ancient Prerogative Becomes the Peoples Environmental Right, 14 U.C.D.L.Rev. 195 (1980).

1981).[10]

The meaning of the words "high water mark," in terms of those shorelands held by the State in trust for the public's full use and enjoyment, has long been understood as applying to both the wet sand area (between the mean low and mean high tide lines) and the dry sand area (above the mean high tide line). As noted in State of Oregon ex rel Thornton v. Hay, 462 P.2d 671 (1969), "The public's assumption that the dry sand as well as the foreshore was "public property" has been reinforced by early judicial decisions. See Shively v. Bowlby, 152 U.S. 1, which affirmed Bowlby v. Shively, 22 Or. 410 (1892)." Id. at 674. (Other

10. This is so, despite law review articles to the contrary. See National Audubon Society v. Superior Court, 33 Cal. 3rd 419, 434, note 15.

citations omitted). In the Bowlby case, the controversy concerned the use of the foreshore, i.e. the dry sand beach. The State's title to the tidelands was confirmed to the "high water mark," which was, in the words of the Thornton court, "for all practical purposes, the vegetation line." Thornton, supra, at 674, note 3.

The English law viewed these shorelands as incapable of private ownership because they were useless for private cultivation and improvement, and that their natural and primary uses, navigation, commerce and fishing, were public in nature. Similarly, the shorelands are recognized today as special lands, and that such lands held in private ownership are not held to the same "absoluteness" as are uplands, i.e.

land above the vegetation line. The special character of the beachlands, including the wet and dry sand areas, has been noted in U.S. Supreme Court and several State Supreme Court decisions. For example, the Supreme Court recognized that tidelands are "unfit for cultivation, the growth of grasses, or other uses to which up-land is applied." San Francisco v. Le Roy, 138 U.S. 656, 672 (1890). In Matthews v. Bay Head Improvement Ass'n., 471 A 2d. 355 (N.J. 1984), the court notes that "Beaches are a unique resource and are irreplaceable." Id. at 364. "Ocean-front property is uniquely suitable for bathing and other recreational activities. Because it is unique and highly in demand, there is growing concern about the reduced 'availability to the public of its priceless beach areas.'"

Lusardi v. Curtis Point Property Owners Ass'n., 86 N.J. 217, 227-228 (1981), quoting from Van Ness v. Borough of Deal, 78 N.J. 174, 180 (1978). Thus, the public has special, recognized expectations in being able to use these shorelands, that are adapted not for uses associated with upland areas, but those long held as proper public uses of the shores.

1. The Sandy Beach Portion Of Appellants' Property Is Subject To The Public Trust.

The Common Law of England placed importance on whether the shorelands were above or below the "high water mark," (See CA. Civil Code Sec. 830 (1872)) though no exact definition of this term was formulated. As a result, the meaning of these words remains somewhat unclear. What must be avoided, however, is interpreting these

words in a manner that would impair the public right of full use and enjoyment of their public trust property.

Although these words have been interpreted to mean the foreshore and dry sand areas, Thornton, infra, Mathews v. Bay Head Improvement Ass'n, 471 A.2d 355, 369 (N.J. 1984) ("Private land...is not immune from the possibility that some of the dry sand may be used by the public incidental to the right of bathing and swimming") it has been argued in a law journal note that only the wet-sand area, i.e. the area between mean low tide and mean high tide, are directly impressed with the Public Trust. Note, Public Beach Access: A Guaranteed Place To Spread Your Towel, 39 U. Fl. L. Rev. 853, 855 (1977). This view, however, does not accurately reflect California Law and

the State's Constitution, the Coastal Zone Management Act, various judicial opinions on the subject, or common sense in view of the nature of the property and its historical, and reasonable, expected use.

These sources attach no such importance to the "mean high tide level," and in fact, suggest that the shorelands that are required in order to allow the public to fully use and enjoy its property interests in these lands form the public trust property. Although arguably, the beach area up to the vegetation line should be included as public trust shorelands in order for the public to fully enjoy their public trust rights, in terms of this case, the Court need only determine that the beachlands up to Appellant's seawall are subject to the Public Trust.

a) California Constitution and Statutory Law

Although in general, public trust rights are unrecorded property rights, in California one public trust right has been given constitutional protection. Article X, section 4 of the California constitution provides:

> No individual, partnership, or corporation claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this state shall be permitted to exclude the right of way to such water whenever it is required for any public purpose ... and the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof. (Emphasis added).

This section expressly preserves a right of way to the public for access to the State's ocean shorelands. It is important to note that this section includes ownership

of either "the frontage or tidal lands." Clearly, combining "frontage" with "tidal lands" suggests no indication that the mean high tide level is the landward boundary of where the public has this right of way. Further, recreational purposes are among the "public purposes" mentioned by this constitutional provision. Gion v. City of Santa Cruz, 2 Cal. 3rd 29, 42 (1970) and cases cited therein. In analyzing this section, the California Supreme Court stated "Although Article [X, section 4] [10] may be limited to some extent by the United States Constitution it clearly indicates that we should encourage pub

10. Note that the numbers of the Articles in California's Constitution have been changed since this 1970 decision. See City of Berkley v. Superior Court, 26 Cal. 3rd 515, 523 (1980).

lic use of shoreline areas whenever that can be done consistently with the federal Constitution." Id. at 43.

Another article of the California Constitution suggests that public lands are those above the mean high tide level on the beach. Article 1, section 25 provides:

> "The people shall have the right to fish upon and from the public lands of the State and in the waters thereof ..."

Although undefined, the term "public lands" surely must include those portions of the ocean shore above the mean high tide level. Otherwise a surf fisherman could be precluded from exercising this constitutionally protected right simply because the water is above the mean high tide level.

b) Coastal Zone Management Act

A federal law, the CZMA must also be

considered. The CZMA authorizes the Secretary of Commerce to make grants to any coastal State with a federally approved coastal zone management plan. Although the CZMA does not expressly give effect to any public trust rights, this federal law is a national expression of the public's desire to restore and enhance "the resources of the nation's coastal zone for this and succeeding generations." 16 USC Sec. 1452(1). A central purpose of the CZMA is "to encourage and assist the states to exercise effectively their responsibilities in the coastal zone." Id. at (2). One such responsibility is protecting the public's trust rights to the full use and enjoyment of the beach trust lands. To this point, the CZMA requires that, inter alia,

federally approved programs "should at least provide for - ...(D) Public access to the coasts for recreation purposes." Id.

California's coastal zone management plan, that implements the State's Coastal Act, was federally approved in accordance with the CZMA. In order for a State plan to be federally approved, the CZMA requires that the plan include a "planning process for ... access to public beaches and other public coastal areas of ... recreational, historical, ... or cultural value." 16 U.S.C. 1454 (b)(7). The CZMA does not mention the mean high tide level. The terms "beaches" or "coastal areas," given their plain meaning, clearly include all of the sandy beaches in addition to nonsandy

(e.g. rocky) coastal areas. This is supported when considering this CZMA requirement in conjunction with California Constitution Article X, section 4.

c) Judicial Opinions

In an often cited case on the public's rights in the shorelands, Shively v. Bowlby, 152 U.S. 1 (1894), decided by the Supreme Court in 1894, Mr. Justice Gray wrote:

> "... the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; ... being chiefly valuable for the public purposes of commerce, navigation and fishery, and for the improvements necessary to secure and promote those purposes ..." (Emphasis added).

In the Shively case, the controversy concerned the construction of a wharf over the tidal shores of the Col-

umbia River. The litigants were not then particularly interested in "dry" versus "wet" sand, because a wharf must necessarily cross both in order to reach deep water to receive ships. Nonetheless, it was recognized that these lands below the uplands are valuable "for the public purposes of commerce, navigation and fishery." As such, they should remain available for these public uses.

Although the California Supreme Court has not addressed the question of the public trust rights in privately owned dry sand beaches, for the question has not previously arisen, the New Jersey Supreme Court has. It is instructive to consider its findings in terms of the case at bar, because both California and New Jersey acquired the same English common law upon entering

the Union. In an extensive review of the "Public Rights in Privately-Owned Dry Sand Beaches," the Supreme Court of New Jersey found that "Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless." Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 364 (N.J. 1984). Further, "The bather's right in the upland sands is not limited to passage. Reasonable enjoyment of the foreshore and the sea cannot be realized unless some enjoyment of the dry sand area is also allowed." Id. at 365. Finally, "private landowners may not in all instances prevent the public from exercising its rights under the public trust doctrine. The

public must be afforded reasonable access to the foreshore as well as a suitable area for recreation on the dry sand." Id. at 366.

It is important to note that this case recognizes the distinction between the line used to demarcate private from public propery, and the line used to demarcate the upward bounds of the public trust rights in the beach. There are many cases discussing where property ends or begins, or what the borders are, or what land was granted, where courts, including the Supreme Court, have held that the mean high tide level is the seaward boundary for many upland grants. But these decisions are in terms of property boundaries, not what lands are or are not subject to the Public Trust. See Borax Consolidated, Ltd. v. Los Angeles, 296 U.S. 10

(1935). The fact that the State does not own a portion of beach does not mean that such beachlands are not subject to the Public Trust. Use of the mean high tide level for property demarcation and conveyance purposes should not be confused with delimiting public trust shorelands. All shorelands, whether publicly or privately held, are potentially subject to Public Trust rights.

Assuming that the portion of Appellants' property of interest in this case, their sandy beachfront, is above the mean high tide level, and this is by no means stipulated, this should not be decisive.[11] The mean high tide

11. There is substantial evidence that the portion of Appellants' property pertinent to this case is actually below the mean high tide level, and thus would clearly be in the public domain. See J.A., at 61. In a study performed by the Senior Lands Agent, in

level, although handy as a reference line for property boundaries, is wholly inappropriate as a metes and bounds for application of the Public Trust Doctrine. "The Public Trust Doctrine should not be bound by a mindless formalism because the generalizations that result from an overly formalistic application of the doctrine would eventually destroy its usefulness." Sax, Liberating the Public Trust Doctrine from its Historical Shackles, 14 U.C.D. L Rev. 185 (1980). Pinning

---

(11. cont.) the Office of the Attorney General for the State of California, of the beach area "immediately seaward of the revetments built to protect the Faria Beach community including the area seaward of the revetment protecting the property located at 3822 West Pacific Coast Highway, Faria Beach [the Nollans property]" the agent stated that:

"... based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls lays below the Mean High Tide Level..." [Joint Appendix, 85].

the landward boundary of the shorelands subject to the Public Trust at the mean high tide level is just such "mindless formalism."

d) Common Sense, Reasonableness, and the Nature of the Shoreland

Fishing, bathing, landing boats, resting cargo, drying nets, or just gathering around a beach fire on a group outing, have long been recognized as proper uses of public shorelands, uses protected by the Public Trust Doctrine. When the tide is above the mean high tide, must a fisherman stand in breaking surf to fish?[12] Is a bather

---

(11. cont.) In addition, the Appellants and Appellee both acknowledge that "At times the wet sandy beach extends up to both the [Appellants'] and other resi- dents existing seawalls, preventing pedestrian passage when the tide is in." (J.A., 68. See Also photos, J.A., 261-276.)

12. The Mathews Court recognizes the rights of fishermen, noting "Some historical support for this propo-

to stay in the water until the tide goes out again? It is the uncommon beach-goer that drops his or her towel on the wet sand rather than the dry. Is a recreational boater to have no place to land during these times of high water? Should a group build a fire, when this is a proper public use, where it is wet?

Pinning the landward boundary of the public trust shorelands to the mean high tide level would render the public's right to recreational use of the shorelands a perforated right. That is, the public would have such a right only when the water level was

---

(12. cont.) sition may be found ... where fishermen, in exercising the right of public fishery in tidal waters, were permitted to draw nets on the beach above the ordinary high water mark in the act of fishing. S. Moore and H. Moore, The History and Law of Fisheries 96 (1908)." Mathews, supra, at 365, Note 7.

below the mean high tide line, and would lose the right whenever the tide was above this line. See Fig. 1.

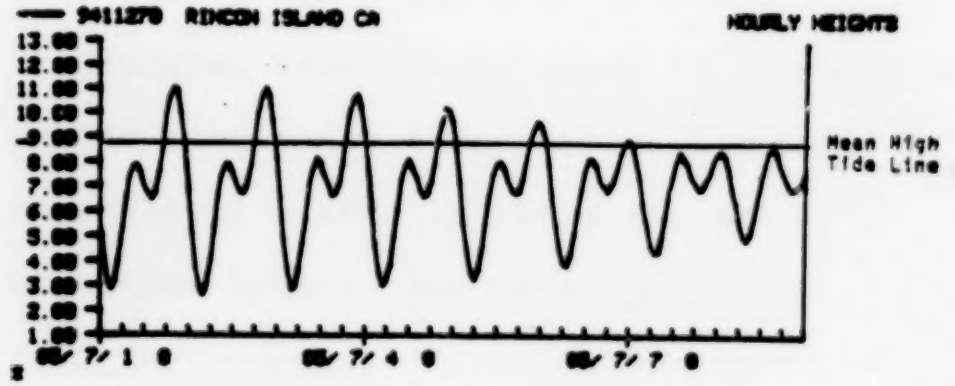


Fig. 1.

It can be seen from this tidal graph, taken from a federal tide gauge approximately three miles from Appellants' property, that the public's rights

would be perforated when the tide is higher than the mean high tide line (MHTL). See Lodging accompanying this brief for a random sample of tidal plots taken at this location.

But how can the public enjoy the right of fishing, bathing and other traditional uses of the coast if their public rights are temporarily vanquished whenever a tide is above the mean high tide level? See Mathews v. Bay Head Improvement, 471 A.2d 355 (1984); Illinois Central v. Illinois, 146 U.S. 387, 452 - 454 (1892). The Public Trust Doctrine characterizes a given right either as being fully protected or as not being protected at all; never is a Public Trust right characterized as perforated. See Note, The Public Trust In Tidal Areas: A Sometime Submerged Traditional Doctrine, 79 Yale L.

J. 762 (1970). It is asserted here that public rights protected by the Public Trust Doctrine are continuous in nature, not subject to interruption by the goings and comings of the tide.

e) Summary

The determining factor of what is, or is not, public trust ocean shorelands should not be whether the land lies above or below the technically surveyed mean high tide level. The mean high tide level may be a handy reference for property boundaries, but is wholly inappropriate as a metes and bounds for application of the Public Trust Doctrine. In terms of shorelands subject to the Public Trust, the California Constitution attaches no significance to the mean high tide level, nor does the CZMA, Supreme Court decisions or common sense. The Supreme Court has

stated that lands "within or above the ebb and flow of the tide" are held in trust by the State for the benefit of the public. Traditional uses of the ocean shorelands must allow for use of the beach above the mean high tide level, otherwise the fisherman's landed boat would wash away, his drying nets would get soaked, and the beach going tourist would have one very wet towel.

As noted in National Audubon, shorelands that are required for use in order to allow the public to fully and reasonably use and enjoy its full property interests in these lands, without interruption, form the public trust property. Appellants' beach front property whether above or below the mean high tide line, is clearly within the ebb and flow of the tide, and is necessary for the public to use in times of

high water in order to fish, swim, or just simply stroll along the beach. The only clear and logical conclusion is that the subject area, Appellants' beach front property below the seawall, is subject to the Public Trust.

2. Appellants As Owners of Shore-front Property Held It Subject to Different Legal Rules From Those Applicable To Inland Property.

There is no bar to a State selling, granting or otherwise conveying lands subject to the Public Trust to private ownership, but this power of alienation is not absolute. A State may alienate Public Trust lands, but "it is grants of land ... that do not substantially impair the public interest in the lands and waters remaing ... that are chiefly ... sustained as a valid exercise of this legislative power." Illinois

Central, supra, at 452. The nature of the State's control is specific: public trust resources must be developed and maintained for a "public purpose." A public interest in a certain public use can only be modified upon express legislative approval, and a finding that the property's new use will continue to serve a public purpose, albeit different from the original public use.

a) Appellants possess this shoreland property subject to the Public Trust.

Public trust lands, such as ocean shorelands, are of such great value to the public for the purposes of commerce, navigation and recreation that "[t]heir improvement by individuals, when permitted, is incidental or subordinate to the public use and right." Shively v. Bowlby, 152 U.S. 1 (1894). The Shively Court elucidated

why the public trust responsibilities vest with the State:

> The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, above high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country; but that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, ... shall not be granted away during the period of territorial government; but, unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State ... Id. at 49-50.

This Shively opinion does not stand for the proposition, however, that public trust properties cannot be conveyed

to private ownership, but only that such properties must be "ultimately administered and dealt with for the public benefit by the State." In Illinois Central, an opinion contemporary with Shively, the Supreme Court directed it's attention to when public trust property may be conveyed to private ownership, and to what extent the grantee takes the property:

> "The trust devolving on the State for the public, and which can only be discharged by the managment and control of the property in which the public has an interest, **cannot be relinquished by a transfer of the property.** The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interest of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. The State can no more abdicate its trust to property in which the whole people are interested ... than it can abdicate its police powers in the administration of

government and the preservation of the peace." Illinois Central, supra, 453 (emphasis added).

Thus, there are only two situations where a conveyance to private ownership could extinguish the Public Trust responsibilities: where the conveyance would promote the interest of the public therein, or where there would be no substantial impairment of the public interest in the lands and waters remaining.

Because shorelands are of a special character, as noted supra, Courts have taken this into account when determining the degree of ownership ("absoluteness") of a landowner's title. The Massachusetts Supreme Court has held that a landowner's title to trust lands is not absolute but is subject to the condition that

it be used for the public purpose for which it was granted. See Boston Waterfront Development Corp. v. Commonwealth, 393 N.E. 2d 356 (Mass. 1979).

It is clear that a conveyance of these shorelands to Appellants with the result of the public losing its rights to pass and repass over this land would not promote "the interest of the public therein." Id. Further, without the right to use this beachfront land as it always has been used, access by the public to the remaining public beaches would be substantially impaired. Although "the [Appellants'] project has not created the need for access ... it is a small project among many others which together limit public access to the tidelands and beaches of the

State and, therefore, collectively create a need for public access." Nollan v. California Coastal Commission, 177 Cal. App. 3rd 719 (1986). See also Grupe v. California, 212 Cal. Rptr. 578, 589 (Respondent's beach front home is one more brick in the wall separating the People of California from the State's beaches). Thus the Shively Court's admonition that Public Trust lands "shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the ... public benefit by the State ..." has been heeded by Appellee. Shively, Supra, at 50.

Further, returning to the California Constitution, Article 1 section 25, which preserves a right to the people to "fish upon and from the

public lands of the State" goes on to provide that:

> " ... no land owned by the State shall ever be sold or transferred without reserving in the people the absolute right to fish thereupon ..."

Clearly, under this section, Appellants' are not vested with the right of sole enjoyment of their beach property for fishing, one of the primary traditional public uses of these beachlands. When viewed in conjunction with Article X, section 4, it follows that if the public reserved its rights of access for fishing, it also reserved its other public trust rights.

b) If there was an attempt to grant or sell this property interest to Appellants' predecessor-in-title free of the Public Trust responsibilities the attempt was an improvident grant.

Legislative efforts to terminate public trust interests through convey-

ances to private individuals should be regarded with great "judicial skepticism" to assure that there has been adequate consideration and protection of the interest of the public. Sax, supra, 490 - 491. As early as 1821 the Supreme Court of New Jersey held in Arnold v. Munday, 6 N.J.L. 1 (Sup. Ct. 1821), that the sovereign power itself cannot, consistent with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters and associated shorelands of the State, divesting all of the citizens of their common right. "This would be a grievance which could never be long born by a free people."

It has been held that any general legislative effort to dispose of public trust property free of the public trust

and its uses remains, regardless of the terms of the grant, subject to the trust. "The interests of the public are paramount in property that is still physically adaptable for trust uses, whereas the interests of the grantees and their successors should prevail insofar as the tidelands have been rendered substantially unusable for those purposes."' City of Berkley v. Superior Court of Alameda, 162 Cal. Rptr 327, cert. denied, 101 S. Ct. 372 (1980). In 1894, the Supreme Court held "such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public." Illinois Central, at 453. This logic applies also for the State responsibility to preserve all Public Trust lands "for the use of the public."

Any such grant of lands subject to the Public Trust into private ownership free from any trust responsibilities would be especially suspect in the State of California. As noted, the Constitution of the State of California provides that no claimant of frontage or tidal lands can exclude the public from these lands if access is desired for any public purpose. To the point here, the Constitution continues to provide that:

> ... the Legislature shall enact such law as will give the most liberal construction to this provision so that access to the navigable waters of this state shall always be attainable for the people thereof.

Any such grant to private ownership of beachlands like Appellants' would do violence to this provision of the State Constitution. Such a grant would clearly be an improvident grant of this property interest.

In view of early New Jersey case of Arnold v. Munday, the recent California case of City of Berkley, the 1892 case of Illinois Central, the California Constitution, as well as the judicially developed doctrine of Public Trust, it is clear that there was no authority to transfer this Public Trust land to the Appellants' or to their predecessors-in-title in fee simple absolute. If such an attempt was made, the conveyance should be held "if not absolutely void on its face, as subject to revocation." Illinois Central, supra, at 453.

c) Defining the public trust ocean shorelands as that strip of land between the mean high tide level and the mean low tide level would likewise be an improvident act beyond the power of a State to make.

If Public Trust rights in land subject to the trust cannot be extinguished by conveying such land into private ownership, it likewise cannot be said that the same end could be accomplished by simple definition of "public trust ocean shorelands." If a legislature, or a court, attempted to define public trust ocean shorelands as that strip of land between the mean high tide level and the mean low tide level, the public's right of full use and enjoyment of the shorelands would be impaired much the same as it would by an improvident conveyance. As shown above, such a definition would serve to perforate the public's trust rights. What is beyond the State's authority to extinguish by conveyance should also be beyond its authority to extinguish by definition.

d) Summary

Because Public Trust rights cannot be relinquished by a transfer of the property to private ownership, the bundle of property rights conveyed to Appellants' predecessor-in-title, and hence to Appellants, did not include the property interest of the public to pass and repass over these beach lands. This property interest remained with the people; Appellant never acquired this property interest for it has always been held by the public.

Where the line demarking the Public Trust area should be placed in this particular case is at the seawall on Appellants' property. Above the seawall the Appellants' property is clearly private and unaffected by the Public Trust since the wall is to keep the sea out. Below the wall the sea, and the

public, enjoy the freedom to come and go.

3. Public Trust Rights Are Held In Trust By The State For All Of The People Of The Nation.

As with all trusts, the Public Trust must have a beneficiary. As the name suggests, the beneficiary here is the public. But who is the "public"? In Illinois Central it was said "It is a title held in trust for the People of the State..." Illinois Central, supra, at 452. The Public Trust is also to be administered so as not to conflict with the U.S. Constitution. See State v. Superior Court of Lake City, 625 P.2d 239, 242 (1981). In view of the Commerce Clause, art. I, sec. 8, and the Privileges and Immunities Clause, art. IV, sec. 2, the Constitution would seem to require that the Public Trust be held for the benefit of all U.S. citi-

zens, if not to all persons legally within the United States. It has been stated that the property held in trust is "property in which the whole people are interested." Boone v. Kingsbury, 206 Cal. 148, 189 (1928). "Thus, it has been suggested that the federal government could enforce such trust." Mallon v. City of Long Beach, 44 Cal.2d 199,215. Justice Spence dissenting, refering to Boone v. Kingsbury. In other words, "the jus privatum of each State" in its shorelands "is subject to the jus publicum of the United States, which is free and uninterrupted passage for all citizens of the United States." Note, The Public Trust in Tidal Areas: A Sometime Submerged Doctrine, 79 Yale Law Journal 762, 787 (1970).

It is fairly clear that the proper-

ty rights held in trust by the State are rights of "the whole people," i.e. all the people of the United States. This would make sense in that it is doubtful that any State could lawfully exclude anyone not a resident of that State from its public trust shorelands.

CONCLUSION

This case involves publicly used shorelands, the beach portion of Appellants' lot. As such, this Court must consider the Public Trust burdens on the portion of Appellants' property in question. To fail to recognize the people's interests and rights in these shorelands would severely impair the public's rights to full use and enjoyment of the ocean shorelands, rights held in trust by the State.

The public's trust rights for full

use and enjoyment of the shorelands extends, at least in this case, up to the Appellants'seawall. Use of the mean high tide level for property demarcation and conveyance purposes should not be confused with delimiting public trust shorelands. The deciding factor of whether ocean shorelands are subject to the Public Trust should not be whether the land lies above or below the mean high tide line. The fact that such shorelands have been conveyed from public to private ownership is without import, for the public trust responsibilities held by the State remain vested in the people unless 1) the conveyance promotes the interests of the public, i.e. the public may still use the conveyed property as its always has, or 2) there is no substantial impairment of the public interest in the lands and

waters remaining.

Appellants' beach front property is public trust ocean shoreland. To hold otherwise would be to perforate a public right to pass and repass as they have used them for decades. If an attempt has been made to grant these public trust shorelands free of the trust burdens, it is an improvident grant, void on its face, or at least revocable. The public trust rights remained with the people when the subject land was conveyed to Appellants' predecessor-in-title. Thus, Appellants' never possessed this property interest, and not possessing of it, the interest cannot be "taken" from them.

The California Appellate Court ruling should be affirmed.

Respectfully submitted,

David C. Slade, Esq.
COASTAL STATES ORGANIZATION
444 North Capitol Street, N.W.
Suite 312
Washington, D.C. 20001
(202) 628-9636